No._____

In the

Supreme Court of the United States

OCTOBER TERM, 1980

THE ROMAN CATHOLIC CHURCH OF THE ARCHIDOCESE OF NEW ORLEANS; THE CONGREGATION OF ST. JULIAN EYMARD CATHOLIC CHURCH, AND BROTHERS OF THE SACRED HEART (BROTHER MARTIN HIGH SCHOOL),
Respondents,

VERSUS

STATE OF LOUISIANA, DEPARTMENT OF LABOR, OFFICE OF EMPLOYMENT SECURITY,
Petitioner.

APPENDICES "A" THROUGH "N"

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COUNSEL FOR PETITIONER

Appendix A

No. 13541.

**Court of Appeal of Louisiana,
First Circuit**

June 9, 1980

Rehearing Denied Sept. 4, 1980.

THE ROMAN CATHOLIC CHURCH OF THE ARCHDIOCESE OF NEW ORLEANS; THE CONGREGATION OF ST. JULIAN EYMARD ROMAN CATHOLIC CHURCH AND BROTHERS OF THE SACRED HEART (BROTHER MARTIN HIGH SCHOOL)
VERSUS
STATE OF LOUISIANA, DEPARTMENT OF LABOR, OFFICE OF EMPLOYMENT SECURITY.

Before ELLIS, CHIASSON and PONDER, JJ.

ELLIS, Judge:

This is a class action in which plaintiffs and intervenors, all of whom operate private non-profit parochial schools, seek a declaratory judgment exempting the employees of those schools from the provisions of the State Employment Security Law, R.S. 23:1471 et seq., and ask for reimbursement of amounts paid under protest pursuant thereto. Defendant is the State of Louisiana, Department of Labor, Office of Employment Security. From a judgment in favor of plaintiffs and intervenors, defendant has appealed.

The record shows, without contradiction, that the parties hereto, plaintiffs and intervenors, Catholic and Protestant, operate private parochial schools, elementary and secondary, on a non-profit basis. All schools are owned and operated by religious non-profit corporations

or by churches which are operated as religious non-profit corporations. In every case, the policies of these schools provide that they are operated primarily as instruments for the teaching of the Christian religion and the Christian way of life. In all cases, the teaching of secular subjects is considered to be of secondary importance.

Prior to 1977, R.S. 23:1472(12)F III provided in part, as follows:

> "III. For the purposes of subparagraphs (I) and (II) of this Paragraph the term 'employment' does not apply to service performed;
>
> "a. In the employ of (i) a church or convention or association of churches, or (ii) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches; or
>
> * * * * * * * * *
>
> "c. . . . in the employ of a school which is not an institution of higher education; . . ."

By Act 745 of 1977, subparagraph c, *supra*, was amended to read as follows:

> "(c) Prior to January 1, 1978, in the employ of a school which is not an institution of higher education; after December 31, 1977, in the employ of a governmental entity referred to in Subparagraph I of this Paragraph if such service is performed by an individual in the exercise of duties:
>
> "(i) As an elected official;
>
> "(ii) As a member of a legislative body, or a member of the judiciary, of this state or its political subdivisions;

"(iii) As a member of the State National Guard or Air National Guard;

"(iv) As an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or similar emergency;

"(v) In a position which, under or pursuant to the laws of this state, is designated as (1) a major nontenured policymaking or advisory position, or (2) a policymaking or advisory position the performance of the duties of which ordinarily does not require more than eight hours per week."

This amendment has the effect of eliminating the exemption of employees of an elementary or secondary school from the provisions of the act. The following allegations of the first petition filed herein are admitted by the defendant:

"11.

"Plaintiffs aver that the Congress of the United States amended the provisions of 26 USC 3309(b) by the adoption of Public Law 94-566 (90 Stat. 2667-2670) which had the effect of specifically eliminating the exclusion for services performed in the employ of non-profit elementary and secondary schools which had been previously in the federal law as part of Section 3309(b) of the Internal Revenue Code of 1954.

"12.

"Plaintiffs aver that the Secretary of Labor of the United States has construed the amended Section 3309(b) as requiring state employment insurance coverage to be extended to employees of all private nonprofit elementary and secondary schools irrespective of the nature of the school or its affiliation

or relationship to a religious denomination or church.

"13.

"Public Law 94-566 has been subsequently interpreted by the Secretary of Labor of the United States, Honorable Ray Marshall, as mandating the extension of employment insurance coverage to church-related schools, . . ."

[1] It is plaintiffs' and intervenors' position herein that, despite the repeal of former Subsection c of R.S. 23:1472(12) F III, the employees of their school systems remain exempt from the coverage of the Employment Security Law under the provisions of R.S. 23:1472(12) F III (a), *supra*. Alternatively, they argue that the repeal of Subsection c is an unconstitutional violation of plaintiffs' rights under the First Amendment to the Constitution of the United States, and Article I of the Louisiana Constitution of 1974.

The trial judge found the language of 23:1472(12) F III (a) to be clear and unambiguous, and "obviously means that the institutions in question are not subject to the tax." He therefore did not reach the constitutional questions alternatively presented by plaintiffs.

We think the trial judge was correct. There is nothing in the record to contradict the testimony offered on behalf of all plaintiffs and intervenors that their schools are operated primarily for religious purposes, and the employees of the schools are employees of the churches. These employees, therefore, clearly fall within the exemption provided by R.S. 23:1472(12) F III (a), *supra*. The fact that Subsection c has been amended so as to eliminate the exemption of employees of non-profit pri-

vate elementary and secondary schools, cannot change the fact that, under the former law, employees of church related schools enjoyed a dual exemption. They now remain exempt.

Defendant urges that the intent of the legislature in repealing former Subsection c was to eliminate the exemption formerly enjoyed by the religiously associated elementary and secondary schools. Defendant points to Secretary of Labor Marshall's interpretation of Public Law 94-566 as mandating such a result because the repeal was supposedly undertaken to conform the Louisiana employment security law to federal guidelines.

[2] The rules of statutory interpretation in Louisiana are clear that a law which is free from all ambiguity must be given effect as written, and that legislative intent may only be considered when the law is subject to more than one reasonable interpretation. *Hebbler v. New Orleans Fire Department* 310 So.2d 113 (La. 1975).

[3] If the legislature did indeed err in expressing its intention, it is not the function of the judicial branch to correct such an error where it creates no ambiguity. *Rada v. Administrator, Div. of Emp. Sec., State, D. of L.* 319 So.2d 460 (La. App. 4th Cir. 1975), writ denied 323 So.2d 128.

The judgment appealed from is therefore affirmed, at defendant's cost.

AFFIRMED.

Appendix B

The Supreme Court of the State of Louisiana

No. 80-C-2325

THE ROMAN CATHOLIC CHURCH OF THE ARCHDIOCESE OF NEW ORLEANS; THE CONGREGATION OF ST. JULIAN EYMARD ROMAN CATHOLIC CHURCH, AND BROTHERS OF THE SACRED HEART (BROTHER MARTIN HIGH SCHOOL)
VERSUS
STATE OF LOUISIANA, DEPARTMENT OF LABOR, OFFICE OF EMPLOYMENT SECURITY

In Re: Office of Employment Security of the Louisiana Department of Labor, through Herbert L. Sumrall, Administrator, applying for Certiorari, or Writ of Review, to the Court of Appeal, First Circuit, No. 13,541, Parish of East Baton Rouge.

November 10, 1980
Denied.

PFC
JAD
WFM
JLD
FAB
JCW

Supreme Court of Louisiana
November 10, 1980

/s/ FRANS LABRANCHE, JR.
CLERK OF COURT FOR THE COURT

Appendix C

DECISION

A hearing was held on March 9, 1978, to determine the coverage of parochial school employees under the Louisiana Employment Security Act.

Present were Hugh T. Ward, Attorney for Trinity Heights Baptist Church; Thomas A. Rayer, Attorney for the Louisiana Catholic Conference which represents substantially all Catholic parochial schools in the State of Louisiana; Emile Comar, Executive Director of the Louisiana Catholic Conference; Howard Jenkins, Superintendent Archdiocese of New Orleans; Brother Felician Fourrier, Louisiana Catholic Conference; Sister M. Michaeline, Superintendent Diocese of Baton Rouge; Gerald Dill, Superintendent Diocese of Lafayette; Ken Sommers, Employer Status Supervisor, Louisiana Office of Employment Security; Rene W. Guay, Chief of Tax Operations, Louisiana Office of Employment Security; Robert F. Critcher, Technical Supervisor, Office of Employment Security and James A. Piper, Attorney, Office of Employment Security.

This hearing was the result of a protest filed by the Louisiana Catholic Conference and Trinity Heights Baptist Church. While it is understood that the final determination of the issue will affect all Parochial Schools in the State of Louisiana whether or not formal protest is made by the individual schools, it will not abridge the right of the individual schools to protest on their own behalf.

Each of the parties protesting the position of the Office of Employment Security that employees of the parochial schools are subject to the Louisiana Employ-

ment Security Law urge they are specifically exempt as the employment falls within the exemption under the provisions of R.S. 23:1472(12)(F)(III)(a).

The Office of the U.S. Secretary of Labor, through the Employment and Training Administration, has interpreted Public Law 91-373 and 94-566 to require States to cover parochial school employment (see attached excerpts from 1976 *Draft Legislation*) and the failure of the States to follow Federal mandates, which preempt State law, could result in the State's loss of certification thereby denying employers tax credits against Federal Unemployment taxes and causing the State to lose the total funding for the administration of the Louisiana Employment Security Program. The foregoing facts considered, it is the conclusion of the Agency that services performed for parochial schools are covered employment irrespective of the fact that the schools may be owned and operated by individual churches or other religious organizations.

/s/ RENÉ GUAY
RENÉ GUAY
Chief of Tax Operations

/s/ JAMES A. PIPER
JAMES A. PIPER
Attorney

Approved:

/s/ THOMAS M. LOCKWOOD
THOS. M. LOCKWOOD
Administrator

Issued March 22, 1978

Appendix D

No. 219,660 - Division I

19th Judicial District Court

Parish of East Baton Rouge

State of Louisiana

THE ROMAN CATHOLIC CHURCH OF THE ARCHDIOCESE OF NEW ORLEANS; THE CONGREGATION OF ST. JULIAN EYMARD CATHOLIC CHURCH AND BROTHERS OF THE SACRED HEART (BROTHER MARTIN HIGH SCHOOL)

VERSUS

STATE OF LOUISIANA, DEPARTMENT OF LABOR, OFFICE OF EMPLOYMENT SECURITY

WRITTEN REASONS FOR JUDGMENT

In this proceeding, the ROMAN CATHOLIC CHURCH OF THE ARCHDIOCESE OF NEW ORLEANS, the CONGREGATION OF ST. JULIAN EYMARD ROMAN CATHOLIC CHURCH, BROTHERS OF THE SACRED HEART, ST. JAMES EPISCOPAL CHURCH OF BATON ROUGE, LOUISIANA (by intervention) and TRINITY HEIGHTS BAPTIST CHURCH (by intervention) on their own behalf and on behalf of all other parties similarly situated are seeking a declaration of their rights and status under the Louisiana Employment Security Law (LSA R.S. 23:1471 et. seq.) and in the event they are found to be not subject thereto, seek a refund of such employment security taxes as have heretofore been paid under protest.

For reasons which will be covered more fully in supplementary written reasons for judgment to be signed by the Court, the Court finds that the services performed for the parochial schools operated by the

churches or religious organizations involved in this litigation constitute services performed in the employ of "a church or convention or association of churches" in the case of ST. JAMES EPISCOPAL SCHOOL, the TRINITY HEIGHTS CHRISTIAN ACADEMY, the archdiocese schools and the catholic schools other than those operated by religious orders, such as THE BROTHERS OF THE SACRED HEART (BROTHER MARTIN HIGH SCHOOL) or separately incorporated religious bodies. In the case of the latter, the Court finds that the services performed constitute service performed in the employ of "an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches."

It is the belief of the Court that this matter is basically one of statutory construction. Prior to the 1976 amendments to the federal law effected by Public Law 94-566 and the subsequent amendments to the Louisiana Unemployment Security Law effected by Act 745 of the 1977 regular session of the Louisiana Legislature, the employment herein involved would not have been covered employment under either the school exclusion or the church exclusion. In the opinion of the Court, the elimination of the school exclusion did not affect the status of the church employees whose primary duties involved teaching in the parochial schools, the administrative ruling of United States Secretary of Labor Marshall to the contrary notwithstanding. There is nothing whatsoever in the legislative history of the Federal Amendment to support his conclusion. To the contrary, the legislative history specifically states that the amendment "excludes services of persons where the em-

ployer is a church" and goes on to state that "a college devoted primarily to preparing students for the ministry would be exempt . . . ," but, "on the other hand, a church related (separately incorporated) charitable organization (such as, for example, an orphanage) would not be considered under the paragraph to be operated primarily for religious purposes." House Report from the Committee on Ways and Means, Employment Security Amendments of 1969, 91 Cong., 1st Sess., Report No. 91-612, P. 44.

Certainly if the Louisiana Legislature had intended to require coverage for teachers employed by a church in the operation of its parochial schools, it would have been an easy matter to have specifically provided by appropriate language that such service did not constitute service in the employ of a church. The Court finds that the language of LSA R.S. 23:1472 (12)F.III(a) is clear and unambiguous and obviously means that the institutions in question are not subject to the tax. However, conceding for the purposes of argument that the section is ambiguous in light of the repeal of the school exclusion, it is well settled in Louisiana, at least, that where a tax statute is susceptible of more than one reasonable interpretation, the construction favorable to taxpayers must be adopted. *Chicago Bridge and Iron Co. v. Cocreham*, 317 So.2d 605, cert. denied, 96 S.Ct. 1427, 424 U.S. 953, 47 L.Ed 359; *United Gas Corp. v. Fontenot*, 129 So.2d 776, 241 La. 564. Considering this canon of statutory construction together with the teaching of *National Labor Relations v. The Catholic Bishop of Chicago*, No. 77-752, decided by the United States Supreme Court in March of this year, that a statute, wherever possible, should be construed so as to avoid First Amendment

constitutional questions, the Court would reach the same conclusion—that is, that the coverage of the Louisiana Employment Security Act does not extend to the plaintiffs, and the parochial schools operated by them.

Having reached this conclusion, the Court need not consider the grave constitutional issues which would be involved were it to be found that the act does, indeed, extend to plaintiffs. Had it been necessary to consider these issues, however, the Court would have been inclined to conclude, as did the Circuit Court of Mobile County, Alabama, in the case entitled *Trinity Evangelical Lutheran Church, et al v. The Department of Industrial Relations, State of Alabama, et al,* Case No. CV 78500325, that the legislation would be unconstitutional as a violation of the establishment and free exercise clauses of the First Amendment of the United States Constitution.

For these reasons, there will be judgment in favor of plaintiffs and intervenors, decreeing them and the class of church schools represented by them to be free from the provisions of the Louisiana Employment Security Law, (LSA R.S. 23:1471 et seq) and entitled to a refund of such tax previously paid under protest in accordance with the procedure set forth in LSA R.S. 47:1576.

Judgment will be signed accordingly.

Baton Rouge, Louisiana, this 31st day of August, 1979.

/s/ ROBERT L. ROLAND
ROBERT L. ROLAND
JUDGE, DIVISION G
NINETEENTH JUDICIAL DISTRICT COURT

NOTICE OF ORDER OF JUDGMENT IN COMPLIANCE WITH THE CODE OF CIVIL PROCEDURE ARTICLE 1913

No. 219,660 Civil Docket I
19th Judicial District Court
Parish of East Baton Rouge
State of Louisiana

RE: THE ROMAN CATHOLIC CHURCH OF THE ARCHDIOCESE OF NEW ORLEANS; THE CONGREGATION OF ST. JULIAN EYMARD CATHOLIC CHURCH AND BROTHERS OF THE SACRED HEART (BROTHER MARTIN HIGH SCHOOL)
VERSUS
STATE OF LOUISIANA, DEPARTMENT OF LABOR, OFFICE OF EMPLOYMENT SECURITY

THOMAS A. RAYER, ESQ.
WILLIAM R. D'ARMOND, ESQ.
HUGH T. WARD, ESQ.
WILLIE D. MAYNOR, ESQ.

GREETING:

You are hereby notified that a decision was rendered and spread on the minutes of Civil Docket I on the 31st day of August, 1979 in the above entitled and numbered cause, and the following is a true copy of the entry of said decision:

> Written reasons filed in the record. Judgment was rendered in favor of plaintiffs and intervenors and against defendants, decreeing them and the class of church schools represented by them to be free from the provisions of the Louisiana Employment Security law and entitled to a refund of such taxes as have been paid under protest, in accordance with the procedure set forth in R.S. 47:1576.

Judgment will be signed accordingly.

( ) Oral decision
(X) Written decision, a copy of which is enclosed herewith.

Thus done, signed and mailed at Baton Rouge, Louisiana, on this 31st day of August 1979.

/s/ KATHLEEN G. BOURG
Deputy Clerk of Court

No. 219,660 Division "I"
19th Judicial District Court
Parish of East Baton Rouge
State of Louisiana

THE ROMAN CATHOLIC CHURCH OF THE ARCHDIOCESE OF NEW ORLEANS; THE CONGREGATION OF ST. JULIAN EYMARD CATHOLIC CHURCH AND BROTHERS OF THE SACRED HEART (BROTHER MARTIN HIGH SCHOOL)
VERSUS
STATE OF LOUISIANA, DEPARTMENT OF LABOR, OFFICE OF EMPLOYMENT SECURITY

JUDGMENT

This cause having been duly heard and submitted to the Court for adjudication, and the Court considering the law and evidence to be in favor of the plaintiffs and intervenors and against the defendant, State of Louisiana, Department of Labor, Office of Employment Security, for the reasons contained in the Written Reasons for Judgment rendered by the Court on August 31, 1979 and for reasons subsequently to be assigned by supplementary written reasons by judgment by the Court,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the plaintiffs, the Roman Catholic Church of the Archdiocese of New Orleans, the Congregation of St. Julian Eymard Roman Catholic Church and Brothers of the Sacred Heart, and also in favor of the intervenors herein, Trinity Heights Baptist Church, and St. James Episcopal Church, to the effect that there be a declaration herein of their rights and status under the Louisiana Employment Security Law (R.S. 23:1471 et. seq.) as follows:

It is hereby decreed that services performed for parochial schools operated, owned or controlled by the plaintiffs herein or the class of plaintiffs as described in the petition filed herein by the Roman Catholic Church of the Archdiocese of New Orleans at both the elementary and secondary level constitute services performed in the employ of a "church or convention or association of churches" and therefore are hereby declared to be excluded from coverage of the Louisiana Employment Security Law under the provisions of R.S. 23:1472 (12)F.III(a) pertaining to the exclusion of services rendered in the employ of a church.

It is further ordered and decreed that the plaintiff, Brothers of the Sacred Heart (Brother Martin High School), and the class of plaintiffs they seek to represent; namely, Catholic schools owned or operated by religious orders within the State of Louisiana, are likewise excluded from coverage by the Louisiana Employment Security Law to the extent that services performed by employees of the plaintiffs and the class of schools they seek to represent constitute services performed in the employ of "an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches" and are, therefore, excluded from such coverage.

It is further ordered, adjudged and decreed that the State of Louisiana, Department of Labor, Office of Employment Security, is directed to refund to the plaintiffs and the class they seek to represent herein any and all sums which may have been paid under protest by said plaintiffs or the class of plaintiffs in reimbursement or by

way of direct taxation to the State of Louisiana for unemployment benefits paid to former employees of said class in accordance with the provisions of R.S. 47:1576 et. seq.

It is further ordered, adjudged and decreed that, in connection with the intervention filed on behalf of Trinity Heights Baptist Church and St. James Episcopal Church, there be judgment herein in favor of intervenors and against the defendant decreeing that intervenors are exempt from the provisions of the Louisiana Employment Security Law (R.S. 23:1471 etc.) and entitled to a refund of any such tax previously paid under protest and in accordance with the procedures set forth in LSA R.S. 47:1576.

It is further ordered, adjudged and decreed that the State of Louisiana, Department of Labor, Office of Employment Security, is hereby directed to pay all costs of these proceedings, to the extent that the state or its agencies is not exempt from the payment of costs.

Baton Rouge, Louisiana, this 28th day of September, 1979.

/s/ ROBERT L. ROLAND
JUDGE ROBERT L. ROLAND, DIVISION "G"

I hereby certify that on this day a notice of the above judgment was mailed by me, with sufficient postage affixed, to: Thomas Rayer; William D'Armond; Hugh Ward; Willie Maynor.

Done and signed on September 28, 1979.

/s/ H. M. "Mike" CANNON
Clerk of Court

Appendix E

No. 13,541
Court of Appeal, First Circuit
State of Louisiana

THE ROMAN CATHOLIC CHURCH OF THE ARCHDIOCESE OF NEW ORLEANS; THE CONGREGATION OF ST. JULIAN EYMARD CATHOLIC CHURCH AND BROTHERS OF THE SACRED HEART (BROTHER MARTIN HIGH SCHOOL)
Plaintiff-Appellees,

VERSUS

STATE OF LOUISIANA, DEPARTMENT OF LABOR, OFFICE OF EMPLOYMENT SECURITY,
Defendant-Appellant.

APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT, STATE OF LOUISIANA, BEFORE HONORABLE ROBERT L. ROLAND, JUDGE, DIVISION "G", PRESIDING

APPLICATION FOR REHEARING ON BEHALF OF THE STATE OF LOUISIANA, DEPARTMENT OF LABOR, OFFICE OF EMPLOYMENT SECURITY,
Defendant-Appellant.

JAMES A. McGRAW AND WILLIE D. MAYNOR
ATTORNEYS FOR DEFENDANT-APPELLANT
P. O. Box 44094 - Capitol Station
Baton Rouge, Louisiana 70804
Telephone: (504) 342-3044

APPLICATION FOR REHEARING

NOW INTO COURT comes Herbert L. Sumrall, in his official capacity as Administrator of the Office of Employment Security of the Louisiana Department of Labor, and, respectfully petitions this Honorable Court to grant a rehearing with respect to its decision rendered on June 9, 1980, for the reasons set out below.

1. This case arises under and is governed by the Employment Security Law, being R.S. 23:1471 et seq. The Court decided, inter alia, that all costs of the proceedings be cast against defendant-appellant. That holding was contrary to the exemption from court costs which is accorded the Office of Employment Security by R.S. 23:1548.

2. The Court further held that the plaintiffs and intervenors "clearly fall within the exemption provided by R.S. 23:1472 (12) F III (a), supra. The fact that subsection c has been amended so as to eliminate the exemption of employees of non-profit private elementary and secondary schools, cannot change the fact that, under the former law, employees of church related schools enjoyed a dual exemption. They now remain exempt."

3. The Court observed that "Defendant points to Secretary of Labor Marshall's interpretation of Public Law 94-566 as mandating such a result [elimination of the exemption formerly enjoyed by church related schools] because the repeal was supposedly undertaken to conform the Louisiana employment security law to federal guidelines."

4. The Court decided that the legislation was not ambiguous and refused to consider the legislative intent,

presumably of the Louisiana Legislature, and also of the legislative intent of Congress, the action of which necessitated the enactment of a statute in Louisiana to keep Louisiana's law in conformity with federal requirements.

5. The Court did not consider the interpretation given to identical statutory language of another state, enacted under the pressure of federal requirements, namely that of the Supreme Court of South Dakota, the first state supreme court to pass on the applicability of state legislation adopted pursuant to federal requirements as they pertain to church related schools' tax status under FUTA and state legislation.

6. In doing or failing to do the things specified in Paragraphs "1" through "5" of this Application for Rehearing, the Court erred and it is the purpose of this Application to have this Honorable Court review its decision dated June 9, 1980 so that it may correct its own errors.

WHEREFORE, defendant-appellant prays that a rehearing be granted and that after due proceedings this Honorable Court vacate its decision dated June 9, 1980 for the reasons which will be set forth in the brief in support of the application for rehearing.

Respectfully submitted,

/s/ WILLIE D. MAYNOR
WILLIE D. MAYNOR AND JAMES A. McGRAW
ATTORNEYS FOR DEFENDANT-APPELLANT
P. O. Box 44094 - Capitol Station
Baton Rouge, Louisiana 70804
Telephone: (504) 342-3044

CERTIFICATE

I certify that a copy of the foregoing application for rehearing has been mailed to all counsel of record for plaintiffs and intervenors by placing the same in the U.S. Mail, properly addressed and with sufficient postage prepaid prior to filing in Court this 9th day of July, 1980.

/s/ WILLIE D. MAYNOR
WILLIE D. MAYNOR

No. 13,541
Court of Appeal, First Circuit
State of Louisiana

THE ROMAN CATHOLIC CHURCH OF THE ARCHDIOCESE OF NEW ORLEANS; THE CONGREGATION OF ST. JULIAN EYMARD CATHOLIC CHURCH AND BROTHERS OF THE SACRED HEART (BROTHER MARTIN HIGH SCHOOL)
Plaintiff-Appellees,

VERSUS

STATE OF LOUISIANA, DEPARTMENT OF LABOR, OFFICE OF EMPLOYMENT SECURITY,
Defendant-Appellant.

APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT, STATE OF LOUISIANA, BEFORE HONORABLE ROBERT L. ROLAND, JUDGE, DIVISION "G", PRESIDING

BRIEF IN SUPPORT OF APPLICATION FOR REHEARING BY THE STATE OF LOUISIANA, DEPARTMENT OF LABOR, OFFICE OF EMPLOYMENT SECURITY,

Defendant-Appellant.

MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE

This action, seeking a tax refund and declaratory relief against the State of Louisiana, Department of Labor, Office of Employment Security arises under the provisions of the Louisiana Employment Security Law, R.S. 23:1471 et seq., particularly Section 1472(12)(F)(III)(a). The plaintiffs and intervenors, who own and administer elementary and secondary schools, complained that certain actions, either taken or contemplated by the defendants, were violative of state and federal law or infringe on the plaintiffs' right to the free exercise of their religion in violation of the First Amendment to the United States Constitution. More specifically, plaintiffs took exception to the U. S. Secretary of Labor's interpretation of the 1976 amendments to 26 U.S.C. §3309(b),* as extending mandatory State unemployment insurance coverage to elementary and secondary schools on the one hand, while retaining an exclusion for churches and religious organizations on the other. Plaintiffs contended that their elementary and secondary schools are beneficiaries of the exception for churches and that their inclusion under FUTA and Louisiana Employment Security Law is unconstitutional. The plaintiffs' and intervenors' suit attacked the State of Louisiana's decision which held that plaintiffs and intervenors are covered employers.

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* 26 U.S.C. §3309(b), as amended by sec. 115 of the Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, 90 Stat. 2667-2670.

SPECIFICATIONS OF ERROR

This Court committed error by affirming the District Court's

1. Finding that the services performed for the parochial schools operated by the churches or religious organizations involved in this litigation constitute services performed in the employ of "a church or convent in an association of churches" or service performed in the employ of "an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches".

2. Affirming the District Court's decision holding that "the elimination of the school exclusion" by P.L. 94-566 and Act 745 of 1977 (R.S. 23:1472(12)(F)(III)(a) "did not affect the status of the church employees whose primary duties involved teaching in the parochial schools, the administrative ruling of United States Secretary of Labor Marshall to the contrary notwithstanding".

3. Failing to consider the legislative history of the 1976 Amendment to FUTA and the decision of the South Dakota Supreme Court in holding that church related schools were covered by FUTA and by state law.

4. Holding that prior to the enactment of Act 745 of 1977 R.S. 23:1472(12)F.III(a) church related schools enjoyed a dual exemption and that "They now remain exempt".

5. Casting defendant-appellant for costs of Court.

ISSUES

1. Does P.L. 94-566, amending 26 U.S.C. §3309(b)

(1), and Act 745 of 1977, amending R.S. 23:1472(12)(F)(III)(a), require that employees of plaintiffs and intervenors be covered by unemployment compensation?

2. Does the legislative history of P.L. 94-566 and the jurisprudence support Secretary of Labor Marshall's ruling that employees of plaintiffs, intervenors, and other entities similarly situated, are covered by unemployment compensation?

ARGUMENT

Defendant-appellant contends that as a result of the enactment of the Unemployment Compensation Amendments of 1976 (Pub. L. 94-566) and Act 745 of 1977, employees of *all* private, nonprofit elementary and secondary school establishments must be included in the State's coverage. Section 3309(b)(2) permits continued exclusion for the services performed by a duly ordained minister of a church in the exercise of his ministry. Employees who do not now work for a church related elementary or secondary school establishment, but who do work directly in the church or for an essentially religious organization may remain within the scope of the Section 3309(b)(1) exclusion.

While P.L. 94-566, on its face, gives little guidance concerning the interrelation between the repeal of the §3309(b)(3) school exemption and the retention of the §3309(b)(1) religious organization exemptions, its history and remedial purposes militate strongly in favor of construing the statute so as to include *all* elementary and secondary schools, such as those organized by the plaintiffs, within unemployment insurance coverage.

A.

THE UNEMPLOYMENT COMPENSATION AMENDMENTS OF 1976 REPRESENT THE CULMINATION OF CONGRESSIONAL EFFORTS TO PROVIDE VIRTUALLY UNIVERSAL UNEMPLOYMENT INSURANCE COVERAGE AND SHOULD BE CONSTRUED IN THAT LIGHT

Congress has followed an unbroken path towards expansion of unemployment insurance coverage. This movement accelerated in the 1970's and culminated in the 1976 Amendments, which

> "Provide coverage under the permanent Federal-State Unemployment Compensation Law for substantially all of the nation's wage and salary earners . . ."

H.R. Rep. No. 755, 94th Cong. 1st Sess. 1 (1975).

The Employment Security Amendments of 1970, by adding new language in 26 U.S.C. §§3304(a)(6), 3306(c)(8), and 3309(a)(1)(A), required State-law coverage of individuals employed by nonprofit institutions (including institutions of higher education). The legislative reports accompanying the amendments unmistakably show that Congress intended to bring individuals employed in nonprofit institutions of higher education, including religious organizations, under program coverage. Thus the House Ways and Means Committee explained that:

> "Under existing Federal law, services performed for nonprofit *religious*, charitable, *educational* and humane organizations for a State and its political subdivisions are exempt from the tax provisions of

> the Federal Unemployment Tax Act. While employment in these organizations and governments is not subject to fluctuations to the same degree as in commerce and industry, unemployment affects a substantial number of their employees, particularly people working in non-professional occupations.
>
> Your committee does not want to change the present tax status of nonprofit organizations, but it is concerned about the need of their employees for protection against wage loss resulting from unemployment."

H.R. Rep. No. 612, 91st Cong., 1st Sess. 11 (1969). [Emphasis supplied.]

In fact, Congress, quite explicitly delineated the limits of the §3309(b)(1) exemption as applied to institutions of higher education.

> "This paragraph excludes services of persons where the employer is a church or convention or association of churches, but does not exclude certain services performed for an organization which may be religious in orientation unless it is operated primarily for religious purposes and is operated, supervised, controlled, or principally supported by a church (or convention or association of churches). *Thus, the Services of the janitor of a church would be excluded but services of a janitor for a separately incorporated college, although it may be church related, would be covered.* A college devoted primarily to preparing students for the ministry would be exempt, as would a novitiate or a house of study training candidates to become members of religious orders. On the other hand, a church related (separately incorporated) charitable organization (such as, for example, an orphanage or a home for the aged) would not be considered under this paragraph to be operated primarily for religious purposes."

H.R. Rep. No. 612, 91st Cong., 1st Sess. 44 (1969) [Emphasis supplied.] Identical language is found in S. Rep. No. 752, 91st Cong. 2d Sess. (1970) at 48-49. Thus, Congress clearly expected that the "operated primarily for religious purposes" language contained in §3309(b)(1)(B) be narrowly construed, at least as applied to educational institutions. The U.S. Department of Labor has followed the congressional mandate and consistently interpreted the 1970 Amendments as requiring State unemployment insurance coverage of all institutions of higher education except for the narrow category including seminaries and novitiates.

In light of Congress' apparent intention in 1970 to bring religiously affiliated colleges and universities within coverage, and in the face of the U.S. Department of Labor's subsequent adoption of this interpretation, Congress' description in 1976, of the objective behind the repeal of §3309(b)(3) is informative:

> "Section 115(b) also has the effect of requiring the State to pay unemployment compensation on the basis of *services performed for all educational institutions*. Under existing law, the State is only required to provide coverage of services performed for institutions of higher education."

H.R. Rep. No. 755, 94th Cong., 1st Sess. 56 (1975). [Emphasis supplied.]

> "*Employees of nonprofit elementary and secondary schools*. The bill would require the State to extend the coverage of their unemployment compensation programs to employees of nonprofit elementary and secondary schools (present law requires coverage for employees of institutions of higher education). The provisions for non-payment of benefits during

vacation periods to school employees of State and local governments would also apply to employees of nonprofit schools.

The States would not be required to provide the new coverage until January 1, 1978."

S. Rep. No. 1265, 94th Cong. 2d Sess. 2 (1976).*

Any lingering doubt concerning Congress' desire to extend coverage to *all* elementary and secondary schools is satisfied by reference to the statistical data cited by Congress regarding the effect of the 1976 Amendments. The Senate Report, S. Rep. No. 1265, 94th Cong., 2d Sess. 8 (1976), estimated the number of new employees who would be covered as a result of the repeal of §3309(b)(3) at 242,000. This figure approximates the total number of teachers in *all* non-profit elementary and secondary schools. Without the inclusion of employees of church-related elementary and secondary schools, the figure would have been substantially less than 242,000 because the staff of church-related elementary and secondary schools comprise more than half of the staff of all non-public elementary and secondary schools in the United States.

Thus, in setting forth the projected impact of the repeal of §3309(b)(3), Congress could only have con-

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* In the summer of 1970 the Department published a document for the use of the States entitled, *Draft Legislation to Implement the Employment Security Amendments of 1970 . . . H.R. 14705.* The purpose of the volume was to suggest to the States the areas in which State unemployment compensation laws would have to be amended to remain in conformity with the 1970 Amendments. The Department's directives in the area of coverage of institutions of higher education is substantially a restatement of the language in the House and Senate Reports quoted above.

templated that the repeal of §3309(b)(3) would bring *all* elementary and secondary schools within FUTA. Considering the total absence of any indication that Congress intended an alternative interpretation and noting, particularly, the necessity that the exceptions to coverage be construed narrowly, the U.S. Secretary of Labor's construction of the Act is virtually mandatory.*

B.

LOUISIANA IS REQUIRED TO ADHERE TO THE U.S. SECRETARY OF LABOR'S INTERPRETATION OF 26 U.S.C. §3309(b), AS MODIFIED BY P.L. 94-566.

In the present case, the State has for many years maintained an unemployment compensation program upon which a large number of employees depend. If Louisiana should fail to remain in accord with FUTA regulations, it risks decertification of its program and the substantial hardship to Louisiana employers and employees which would result from termination of its FUTA benefits. Thus, while initial participation in FUTA is voluntary, once a state has established an unemployment compensation program, it is compelled to conform its program to FUTA regulations, as they may be amended from time to time.

The fact that the states are under compulsion to adopt the U.S. Secretary of Labor's interpretation of the modification of §3309(b) is evidenced by the directive from the U.S. Department of Labor to "All State Em-

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* According to the Census Bureau's *Statistical Abstract of the United States* (1977 ed.) there were 261,000 full-time teachers in non-rofit elementary and secondary schools in 1975 of which 150,000 were in Roman Catholic schools. PP. 145, 147, tables 235, 237.

ployment Security Agencies" from Lawrence W. Rogers, Administrator of Field Operations (herein "the Directive"). The Directive states that "Secretary Marshall's decision concerning unemployment insurance coverage of services performed for church-related schools . . . was clearly intended to result in State coverage of church-related elementary and secondary schools." The Secretary's interpretation was not merely advisory. On the contrary, the Secretary was fully justified in expecting total compliance by the states.

In order to remain consistent with Federal requirements essential to certification of Louisiana's Unemployment Compensation Program, the Legislature adopted the identical language of 26 U.S.C. §3309(b), P.L. 94-566, in passing Act 745 of 1977, effective January 1, 1978, which amended R.S. 23:1472 (12)(F)(III)(a). The argument advanced in support of Defendant-appellant's Specification of Error No. 3 is equally applicable to this fourth Specification of Error.

The several states of the Union enacted "suggested legislation" which was furnished them by the U.S. Secretary of Labor following the enactment of the 1970 Amendments to FUTA. It may be of some value to the Court to compare the language of the statutes of two states as it existed prior to the enactment of the 1976 Amendments to FUTA. The two states' statutes chosen are coincidentally those of Louisiana and South Dakota, which provided as follows:

SDCL 61-1-10.4, before the enactment of H. 587, L. 1977, provided that:

> "For the purpose of §§61-1-10.2 and 61-1-10.3 the term 'employment' does not apply to service performed:

"(1) In the employ of

(a) a church or convention or association of churches, or

(b) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches; or

"(2) By a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or

"(3) In the employ of a school *other than a state school* which is not an institution of higher education."

La. R.S. 23:1472(12) F (III) (a, b, c), before the enactment of Act 745 of 1977 provided as follows:

"III. For the purposes of subparagraphs (I) and (II) of this paragraph, the term 'employment' does not apply to service performed;

a. in the employ of (i) a church or convention or association of churches, or (ii) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches; or

b. by a duly ordained, commissioned or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or

c. in the employ of a school which is not an institution of higher education.

Act 745 of the 1977 Louisiana Legislature and H. 587, L. 1977 of the South Dakota Legislature employ identical language for the amended subparagraph "c", in the Louisiana legislation and the amended subparagraph "3", in the South Dakota legislation. It is therefore an inescapable conclusion that at least Louisiana and South Dakota enacted its exemption deletion language after having been goaded into doing so. To conclude otherwise is to attribute to our Legislature or to the South Dakota Legislature the gift of extrasensory perception, which defendant-appellant doubts seriously.

The South Dakota Supreme Court, on March 27, 1980, upheld the state statute, which was mandated by the 1976 Congressional enactment, in the proceedings entitled "In the Matter of the Determination of Unemployment Insurance Coverage of Northwestern Lutheran Academy and St. Martin's Evangelical Lutheran School". A copy of the South Dakota decision was annexed as an exhibit to defendant-appellant's supplemental brief in this court and its impact on this controversy was called to the attention of the Court. However, it is apparent that no consideration was given to the decision of the highest appellate court, either state or federal, which has thus far had before it the issue of coverage of church related schools. The South Dakota Supreme Court sized up the issue thusly:

> "The threshold question on appeal involves a determination of congressional intent with respect to the repeal of Section 3309(b)(3) of FUTA (which resulted in the effective repeal of SDCL 61-1-10.4(3))."

The church school litigants contended that the removal of the exclusion from unemployment compensa-

tion tax liability for school employment was meant only to extend coverage to private, nonparochial schools and did not affect the exclusion from coverage of parochial schools. The Supreme Court observed that "an examination of the recent legislative background of FUTA, however, indicates otherwise" and quoted the same Congressional committee reports which defendant-appellant quoted from in its brief filed with this Court, concluding, as follows:

> "We conclude from our reading of the 1970 congressional revisions and the accompanying legislative reports that Congress expected the 'operated primarily for religious purposes' language in section 3309 (b)(1)(B) (corresponding to that in SDCL 61-1-10.4(1)(b) to be narrowly construed, at least as applied to educational institutions. The Department of Labor has adhered to this congressional mandate and consistently interpreted the 1970 amendments as requiring state unemployment coverage of all institutions of higher education except for the narrow category including seminaries and novitiates which are devoted exclusively to religious training and indoctrination.
>
> "In view of Congress' apparent intention in 1970 to bring religiously affiliated institutions of higher education within coverage, and in light of the Labor Department's subsequent adoption of this interpretation, Congress' description of the objective behind the 1976 repeal of Section 3309(b)(3) (culminating in the repeal of SDCL 61-1-10.4(3)) is informative. According to Congress, the repeal of this section 'has the affect of requiring the State to pay unemployment compensation on the basis of services performed for *all* educational institutions. Under existing law, the State is only required to

provide coverage of services performed for institutions of higher education.' H.R. Rep. No. 755, 94th Cong., 1st Sess. 6 (1975). (emphasis supplied)

"As stated in the Senate Report on the bill:

> The bill would require the State to extend the coverage of their unemployment compensation programs to employees of non-profit elementary and secondary schools (present law requires coverage for employees of institutions of higher education). The provisions for non-payment of benefits during vacation periods to school employees of State and local governments would also apply to employees of non-profit schools.

"It is further significant that S. Rep. No. 1265, 94th Cong. 2d Sess., 8 (1976) estimated the number of new employees who would be covered as a result of the repeal of Section 3309(b)(3) at 242,000. This figure approximates the total number of teachers in all non-profit elementary and secondary schools. Absent the inclusion of employees of church-related elementary and secondary schools, the figure would be considerably less than 242,000, because the teachers in such schools comprise more than half of the staff of all nonpublic and elementary and secondary schools in the United States.*

"Moreover, when faced with the problem of statutory construction, we must show great deference to the interpretation given such statutes by the

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* According to the Census Bureau's *Statistical Abstract* of the United States (1977), there were 261,000 full-time teachers in non-profit elementary and secondary schools in 1975 of which 150,000 were in Roman Catholic Schools. Thus, it is clear that Congress contemplated that the repeal of §3309(b)(3) would bring all elementary and secondary schools within the ambit of FUTA.

agency charged with their administration. *Udall v. Tallman*, 380 U.S. 1, 85 S. Ct. 792, 13 L. Ed. 2d 616 (1965). Shortly after the enactment of the 1970 amendments, the Department published its interpretation of those amendments which stated that the exemption for services performed for churches or religious organizations did not extend to services performed for religiously affiliated institutions of higher education. The Department's view of the objective behind the 1976 amendments, expressed in the Secretary's letter, supra, is a logical and necessary extension of the position of which the Department has taken without objection since 1970. We find further significance in the fact that Congress did not attempt in 1976 to alter the Department's interpretation of §3309(b)(1). The 'failure of Congress to alter or amend . . . [a] section, notwithstanding this consistent construction by the department charged with its enforcement, creates a presumption in favor of the administrative interpretation, to which we should give great weight, even if we doubted the correctness of the ruling of the Department of Labor.' *Costanzo v. Tillinghast*, 287 U.S. 341, 345, 53 S. Ct. 152, 154, 77 L. Ed. 350, 353 (1932)."

This Court should have considered the South Dakota Supreme Court decision in construing the statute which is the subject of this litigation because the language of both the South Dakota and the Louisiana statutes is identical. *McNamara v. Leslie Ardoin, Inc.*, 357 So.2d 1317 (La.App. 3 Cir., 1978), Writs Refused 359 So.2d 622; and *Beckham v. Hartford Accident & Indemnity Company*, 137 So.2d 99 (La. App. 3 Cir., 1962).

Beckham was decided unanimously by an En Banc

court. The Court was confronted with the issue of interpreting Articles 966 and 968 of the Code of Civil Procedure, dealing with Summary Judgment and Judgment on the Pleadings. Culpepper, J., for the Court, observed, in pertinent part, as follows:

> "An understanding of the problem necessitates a brief review of the history of Rule 56 of the Fed. Rules of Civil procedure, . . . on which our own summary judgment procedure, . . . , is largely based.
>
> " . . .
>
> "However, Federal Rule 56(c) was omitted from our Code of Civil Procedure, . . .
>
> "Applicable here is the rule of the statutory construction that where our Legislature adopts a new law, using as a source a statute which has already been adopted in another state or by our Federal Government, and omits provisions of said source statute, then it must be construed that the intention of our legislature was not to adopt the omitted portion. *Simmesport State Bank v. Scallan*, 134 So.2d 391 (3rd Cir., App. 1961).
>
> "Applying the above principal (sic) of law to the instant case, it is apparent that our legislature and the redactors of our code of Civil Procedure intentionally omitted, as unnecessary in Louisiana, any provision for summary judgment on the issue of liability alone. . ."

137 So.2d 99, 101, 102. (wording deleted and parenthetical matter added by the writer). ACCORD: *Louisiana Civil Service League v. Forbes*, 258 La. 390, 246 So.2d 800 (1971).

McNamara involved a state tax statute which was patterned after a federal tax statute. Domengeaux, J.,

for the Court, in reversing the judgment in favor of the taxpayer, reasoned, in pertinent part, as follows:

> "At the outset we note that, as a basic rule of statutory interpretation, when legislation is patterned after federal law, Louisiana courts may look to federal interpretations in order to ascertain the meaning and application of the statutes in question. (citations omitted). We also note that, on at least one occasion, when the Louisiana Supreme Court was faced with interpreting a state income tax provision copied from the federal act, they found that the Louisiana Legislature intended to incorporate into Louisiana law the *federal regulations and court decisions* surrounding the federal provisions at the time of adoption. *Standard Oil Company of New Jersey v. Collector of Revenue*, 210 La. 428, 27 So.2d 268 (1946). Finally, we note that in taxing legislation, exemptions must be strictly construed, and clearly, unequivocally, and affirmatively established. (citations omitted).
>
> "We now proceed to examine the history of the statutes in question. The Louisiana income tax law came into existence by virtue of Act No. 21 of 1934. To a large extent, it was patterned after the federal internal revenue code in existence at that time. The provision dealing with exemptions from the tax was found in Section 27 of the Act. . . . When Section 27 is compared with the equivalent federal provision in existence during 1934, . . . , it is seen that the Louisiana legislation is almost a verbatim copy of the federal act. We therefore are justified in turning to federal interpretations of the provision.
>
> "Treasury regulation Art. 522 . . . , in effect during 1934, provided the following: (text omitted).
>
> "The validity of the federal regulation is not questioned, and we assume that it is a correct in-

terpretation of the federal statute. *Under rules of statutory interpretation, it is clear that the Louisiana Legislature intended to exempt only those agricultural organizations which qualified under Treasury regulations Art. 522 . . . , in effect in 1934. . . .*

"In addition to these rules of statutory interpretation, we find specific support for this view in the Louisiana Supreme Court's decision in *Standard Oil Co. of New Jersey v. Collector of Revenue*, supra, which is the legal enantiomorph of the instant controversy. In *Standard Oil, the validity of a state regulation was in question. The Collector of Revenue has promulgated a regulation which differed from the corresponding federal regulation. The Court invalidated the state regulation and stated that when the Louisiana Legislature passed a verbatim copy of the federal act, the federal interpretation of the statute was also adopted. As such, the state regulation could not differ from the federal regulation. In the instant case, the state regulation parallels the federal regulation. It follows from the principles set forth in Standard Oil that the regulation is a proper interpretation of the statute and should be applied to this case.* Defendant is not exempt from the payment of state income tax." 357 So.2d 1317, 1319-1322. (Italics supplied by the writer).

The Connecticut Supreme Court, in *State v. Elliott*, 177 Conn. 1, 411 A.2d 3 (1979), was confronted with the problem of interpreting a Connecticut statute which adopted the "extreme emotional distress" defense in criminal proceedings. The Connecticut statute was adopted virtually verbatim from the New York Murder Statute which had been interpreted by the Court of Ap-

peal of New York (that state's highest appellate court) and by the Supreme Court of the United States. In *Elliott*, the Court, in adopting the interpretation placed on the "borrowed" statute by the courts of the "lender" state, reasoned, in part, that:

> "The fact that a statute is almost a literal copy of a statute of a sister state is persuasive evidence of a practical reenactment of the statute of the sister state; as such it is proper to resort to decisions of a sister court construing that statutory language. *Witherspoon v. Salm*, 251 Ind. 575, 243 N.E.2d 876 (1969); *82 C.J.S., "Statutes"*, §371; *73 Am.Jr.2d, "Statutes"*, §166; *People v. Connally*, 36 Cal.App.3rd 379, 111 Cal.Rptr. 409 (1973)." 411 A.2d 3,6.

82 C.J.S., "Statutes", § 371, cited in the Elliott case, provides, in pertinent part, as follows:

> ". . . . .
>
> "Where a legislature adopts a federal statute verbatim, the history of the law and the intent of congress when it adopted the provision have a bearing on the intent of the legislature, and it may be presumed that the legislature knew of the interpretation placed on the provision as expressed during the debates when before congress for adoption, had the same objectives in mind, and employed the statutory terms in the same sense. [citing: *American National Insurance Co. v. Keitel*, 352 Mo. 1107, 186 S.W.2d 447; *In re Walk's Estate*, 79 N.Y.S.2d 645, 192 Misc. 237; *Dawson v. Tobin*, 74 N.D. 713, 24 N.W.2d 737; *Shirk v. Simco*, 200 S.W.2d 704, reversed on other grounds, 146 Tex.259, 206 S.W.2d 221]. So where the adoption of an amendment to the state act follows shortly after the adoption of an amendment to the federal act, and the two are

couched in almost identical language, it may be assumed that both had the same purpose. [citing: *Dupuy v. McColgan*, 112 Cal.App.2d 237, 246 P.2d 155; *Home Beneficial Life Ins. Co. v. Unemployment Compensation Commission*, 181 Va. 811, 27 S.E.2d 159]. In construing a tax law enacted after the passage of a similar law by the federal government, the state court will not consider the fact that only that part of the federal law which is favorable to the state was adopted and the part favorable to the taxpayer was ignored or eliminated; . . . [citing: *Rathbone v. Collector of Revenue*, 196 La. 795, 200 So. 149].

". . . . .

". . . . .

". . . . . Rulings of administrative bodies having the responsibility, in the original jurisdiction, of enforcing the adopted statute are not binding on the courts of the adopting jurisdiction, although great weight is usually given to such rulings. [citing: *Briggs & Co. v. District of Columbia*, 196 F.2d 241; *Unemployment Compensation Commission of North Carolina v. Wachovia Bank & Trust Co.*, 215 N.C. 491, 2 S.E.2d 592; *Saunders v. Maryland Unemployment Compensation Board*, 188 Md. 677, 53 A.2d 579; and other cases]. . . . . ."

82 C.J.S., "Statutes", §373(b), states, in pertinent part, as follows:

"It is the construction of the statute which prevailed in the original state at the time of its adoption by the other state that is presumed to follow the statute, and subsequent decisions have no controlling effect on the adopting state, although they may be strongly persuasive, and will be followed where they are considered to give true force and effect to

the statute, and the judicial construction existing where the statute was adopted was not well known, definite, and settled, or its application uniform. [citing numerous cases]."

COURT COSTS:

R.S. 23:1548, being a part of the Louisiana Employment Security Law, provides, in pertinent part, that "The administrator shall not be required to furnish any court bond, nor to make a deposit for or pay any costs of court in any legal proceedings, ..." The Court's assessing the defendant-appellant for costs of court in these proceedings was therefore erroneous and the decision of the Court should accordingly be corrected.

SUMMARY:

The uniform nature of the legislation which is the subject of the case at Bar is readily apparent as evidenced by a comparison of the South Dakota and Louisiana legislation. The reason is quite simple: both states enacted the language of the U.S. Department of Labor's "Suggested Legislation" rather than face the certainty of having their unemployment benefits programs decertified by the U.S. Secretary of Labor, with the resultant loss of administration funds and the loss to the states' employers of the tax benefits which would necessarily and logically follow a decertification of the state's unemployment benefits programs. One follows the other as surely as night follows daylight.

The intent of Congress was manifested by various reports of the committees of Congress which considered the measure which became known as Public Law 94-566, the 1976 Amendments to FUTA. The pertinent excerpts

from Congressional committee reports were an integral part of defendant-appellant's Original Brief. Those excerpts make it quite plain that Congress intended to wipe out the exemptions which church related schools of the elementary and secondary variety had enjoyed prior to the taking effect of P.L. 94-566. The Louisiana Legislature adopted the U.S. Department of Labor's "Suggested Legislation", under threat of losing federal funding and tax benefits to the state's employers, "whole hog", or "hook, line, and sinker". The South Dakota Supreme Court saw the mandated legislation for what it was and correctly decided that Congressional intent was to be used to determine the intent of the South Dakota Legislature in its enacting the legislation mandated upon it.

The Louisiana Supreme Court, in *Standard Oil Co. of New Jersey v. Collector of Revenue*, supra, voided a state regulation which differed from the corresponding federal regulation interpretative of a statute which the Louisiana Legislature enacted verbatim a federal statute the federal interpretation of the statute was also adopted and the state was powerless to promulgate a regulation which differed from the federal regulation interpreting the federal statute. In the case at Bar the state statute and the federal statute provide for the same thing and the federal statute has been authoritatively interpreted by the U.S. Secretary of Labor since at least 1970 in such a way as to eliminate exemptions which had been the main obstacle to universal coverage by the unemployment compensation laws of the Congress and of the several states.

The failure of the Court to consider the well-

reasoned opinion of the South Dakota Supreme Court and its failure to give proper consideration, if any was given, to the intention of Congress as evidenced by the various reports of the committees of Congress, was clearly erroneous and the Court should therefore grant a rehearing in this matter.

Defendant-appellant respectfully prays that this case, on rehearing, be heard by the Court sitting En Banc and, after due proceedings, the decision dated June 9, 1980 be reversed in every respect, and that there be a decision holding that plaintiffs and intervenors and all others similarly situated are covered employers within the intendment of both the state and federal statutes in controversy herein.

Respectfully submitted,

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CERTIFICATE

I certify that a copy of the foregoing Brief in Support of Defendant-Appellant's Application for Rehearing has been served on counsel of record for all plaintiffs and intervenors by depositing the same in the U.S. Mail, properly addressed and with sufficient postage prepaid this ninth day of July, 1980 at Baton Rouge, Louisiana.

WILLIE D. MAYNOR

No. 13,541

Court of Appeal,
First Circuit,
State of Louisiana

Parish of East Baton Rouge

THE ROMAN CATHOLIC CHURCH OF NEW ORLEANS
VERSUS
STATE OF LA., ET AL.

On Application For Rehearing.

The State, Department of Labor, Division of Employment Security, complains of the assessment of costs against it, claiming the exemption provided by R.S. 23:1548. This exemption from payment of costs applies only to proceeding to enforce collection of unpaid contributions. R.S. 13:5112(c), which exempts the office of Employment Security from the provisions of that statute, limits the exemption only to judicial review proceedings under 23:1634.

This is a class action suit against the Division of Employment Security for a declaratory judgment, which does not fall under either of the above two exemptions.

Rehearing refused.

Baton Rouge, Louisiana, September 4, 1980.

Ellis, J

Chiasson, J

Ponder, J

Filed September 4, 1980

Clerk *Judges*

I hereby certify this document was mailed this date: September 4, 1980.

CLERK OF COURT

Appendix F

No. 80-C-2325

In the Supreme Court of Louisiana

THE ROMAN CATHOLIC CHURCH OF THE ARCHDIOCESE OF NEW ORLEANS; THE CONGREGATION OF ST. JULIAN EYMARD CATHOLIC CHURCH AND BROTHERS OF THE SACRED HEART (BROTHER MARTIN HIGH SCHOOL)

Plaintiff-Appellees,

VERSUS

STATE OF LOUISIANA, DEPARTMENT OF LABOR, OFFICE OF EMPLOYMENT SECURITY,

Defendant-Appellant-Applicant.

APPLICATION ON BEHALF OF THE ADMINISTRATOR OF THE OFFICE OF EMPLOYMENT SECURITY, LOUISIANA DEPARTMENT OF LABOR, FOR A WRIT OF CERTIORARI, OR REVIEW TO REVIEW A JUDGMENT OF THE COURT OF APPEAL, FIRST CIRCUIT, DOCKET NUMBER 13,541

THE ISSUES

1. Whether church related schools are covered by the Louisiana Employment Security Law.

2. Whether R.S. 23:1472(12)(F)(III) is so clear and

free from ambiguity as to render inapplicable the legislative history of its progenitor, 26 U.S.C.A. §3309(b) as amended by P.L. 94-566, as a tool of interpretation.

3. Whether decisions of Courts of last resort of other states are persuasive in interpreting statutes identically phrased in the laws of other states and of Louisiana.

4. Whether R.S. 23:1472(12)(F)(III), a clone of 26 U.S.C.A. §3309(b) can validly be interpreted by the Courts of this state in a manner different than the interpretation placed on the progenitor by the federal agency charged with its interpretation/administration.

ASSIGNMENTS OF ERROR

The First Circuit Court of Appeal erred in:

1. Holding that elementary and secondary schools owned and/or operated by plaintiffs, intervenors, and others similarly situated continue to enjoy one of the two exemptions from coverage in effect before the effective date of Act 745 of 1977, amending R.S. 23:1472 (12) (F)(III) and holding it is free of ambiguity so that its progenitor's legislative history need not be examined in interpreting its meaning.

2. Failing to give any consideration to the authoritative interpretation of the Supreme Court of South Dakota in litigation contesting the identically worded statute of that state, which decision held the statute validly removed the church school exemption.

3. Failing to recognize and apply the Louisiana jurisprudential principle that when the Louisiana Legislature passes, verbatim a federal statute, the Legislature automatically adopts the federal interpretation of

the statute and state agencies and courts cannot validly interpret the state statute contrary to the federal interpretation.

ARGUMENT ON FIRST ASSIGNMENT OF ERROR

ARGUMENT ON FIRST ASSIGNMENT: HOLDING THAT ELEMENTARY AND SECONDARY SCHOOLS OWNED AND/OR OPERATED BY PLAINTIFFS, INTERVENORS, AND OTHERS SIMILARLY SITUATED CONTINUE TO ENJOY ONE OF THE TWO EXEMPTIONS FROM COVERAGE IN EFFECT BEFORE THE EFFECTIVE DATE OF ACT 745 OF 1977, AMENDING R.S. 23:1472(12)(F)(III) AND HOLDING IT IS FREE OF AMBIGUITY SO THAT ITS PROGENITOR'S LEGISLATIVE HISTORY NEED NOT BE EXAMINED IN INTERPRETING ITS MEANING.

Defendant-appellant-applicant contends that, as a result of the enactment of the Unemployment Compensation Amendments of 1976 (Pub. L. 94-566) and Act 745 of 1977, employees of *all* private, nonprofit elementary and secondary school establishments must be included in the State's coverage. 26 U.S.C.A. §3309(b)(2) permits continued exclusion for the services performed by a duly ordained minister of a church in the exercise of his ministry. Employees who do not work for a church-related elementary or secondary school establishment, but who work directly in the church or for an essentially religious organization may remain within the scope of the Section 3309(b)(1) exclusion.

While P.L. 94-566, on its face, gives little guidance concerning the interrelation between the repeal of the

§3309(b)(3) school exemption and the retention of the §3309(b)(1) religious organization exemptions, its history and remedial purposes militate strongly in favor of construing the statute so as to include *all* elementary and secondary schools, such as those organized by the plaintiffs, within unemployment insurance coverage.

A.

THE UNEMPLOYMENT COMPENSATION AMENDMENTS OF 1976 REPRESENT THE CULMINATION OF CONGRESSIONAL EFFORTS TO PROVIDE VIRTUALLY UNIVERSAL UNEMPLOYMENT INSURANCE COVERAGE AND SHOULD BE CONSTRUED IN THAT LIGHT

Congress has followed an unbroken path towards expansion of unemployment insurance coverage. This movement accelerated in the 1970's and culminated in the 1976 Amendments, which

> "Provide coverage under the permanent Federal-State Unemployment Compensation Law for substantially all of the nation's wage and salary earners . . ."

H.R. Rep. No. 755, 94th Cong. 1st Sess. 1 (1975).

The Employment Security Amendments of 1970, by adding new language in 26 U.S.C.A. §§3304(a)(6), 3306(c)(8), and 3309(a)(1)(A), required State law coverage of individuals employed by nonprofit organizations (including institutions of higher education). The legislative reports accompanying the amendments unmistakably show that Congress intended to bring individuals employed in nonprofit institutions of higher education, including religious organizations, under program cover-

age. Thus the House Ways and Means Committee explained that:

> "Under existing Federal law, services performed for nonprofit *religious, charitable, educational* and humane organizations for a State and its political subdivisions are exempt from the tax provisions of the Federal Unemployment Tax Act. While employment in these organizations and governments is not subject to fluctuations to the same degree as in commerce and industry, unemployment affects a substantial number of their employees, particularly people working in non-professional occupations.
>
> Your committee does not want to change the present tax status of nonprofit organizations, but it is concerned about the need of their employees for protection against wage loss resulting from unemployment."

H.R. Rep. No. 612, No. 612, 91st Cong., 1st Sess. 11 (1969). [Emphasis supplied.]

In fact, Congress, quite explicitly delineated the limits of the §3309(b)(1) exemption as applied to institutions of higher education.

> "This paragraph excludes services of persons where the employer is a church or convention or association of churches, but does not exclude certain services performed for an organization which may be religious in orientation unless it is operated primarily for religious purposes and is operated, supervised, controlled, or principally supported by a church (or convention or association of churches). *Thus, the Services of the janitor of a church would be excluded but services of a janitor for a separately incorporated college, although it may be church related, would be covered.* A college devoted primarily to preparing students for the ministry would be exempt, as would a novitiate or a house of study

> training candidates to become members of religious orders. On the other hand, a church related (separately incorporated) charitable organization (such as, for example, an orphanage or a home for the aged) would not be considered under this paragraph to be operated primarily for religious purposes."

H.R. Rep. No. 612, 91st Cong., 1st Sess. 44 (1969) [Emphasis supplied.] Identical language is found in S. Rep. No. 752, 91st Cong. 2d Sess. (1970) at 48-49. Thus, Congress clearly expected that the "operated primarily for religious purposes" language contained in §3309(b)(1)(B) be narrowly construed, at least as applied to educational institutions. The U.S. Department of Labor has followed the congressional mandate and consistently interpreted the 1970 Amendments as requiring State unemployment insurance coverage of all institutions of higher education except for the narrow category including seminaries and novitiates.

In light of Congress' apparent intention in 1970 to bring religiously affiliated colleges and universities within coverage, and in the face of the U.S. Department of Labor's subsequent adoption of this interpretation, Congress' description of 1976, of the objective behind the repeal of §3309(b)(3) is informative:

> "Section 115(b) also has the effect of requiring the State to pay unemployment compensation on the basis of *services performed for all educational institutions*. Under existing law, the State is only required to provide coverage of services performed for institutions of higher education."

H.R. Rep. No. 755, 94th Cong., 1st Sess. 56 (1975). [Emphasis supplied.]

"*Employees of nonprofit elementary and secondary*

schools. The bill would require the State to extend the coverage of their unemployment compensation programs to employees of nonprofit elementary and secondary schools (present law requires coverage for employees of institutions of higher education). The provisions for non-payment of benefits during vacation periods to school employees of State and local governments would also apply to employees of nonprofit schools.

The States would not be required to provide the new coverage until January 1, 1978."

S. Rep. No. 1265, 94th Cong. 2d Sess. 1976.*

Any lingering doubt concerning Congress' desire to extend coverage to *all* elementary and secondary schools is satisfied by reference to the statistical data cited by Congress regarding the effect of the 1976 Amendments. The Senate Report, S. Rep. No. 1265, 94th Cong., 2d Sess. 8 (1976), estimated the number of new employees who would be covered as a result of the repeal of §3309(b)(3) at 242,000. This figure approximates the total number of teachers in *all* nonprofit elementary and secondary schools. Without the inclusion of employees of church-related elementary and secondary schools, the figure would have been substantially less than 242,000 because the staff of church-related elementary and sec-

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* In the summer of 1970 the Department published a document for the use of the States entitled, *Draft Legislation to Implement the Employment Security Amendments of 1970 . . . H.R. 14705.* The purpose of the volume was to suggest to the States the areas in which State unemployment compensation laws would have to be amended to remain in conformity with the 1970 Amendments. The Department's directives in the area of coverage of institutions of higher education is substantially a restatement of the language in the House and Senate Reports quoted above.

ondary schools comprise more than half of the staff of all non-public elementary and secondary schools in the United States.*

Thus, in setting forth the projected impact of the repeal of §3309(b)(3), Congress could only have contemplated that the repeal of §3309(b)(3) would bring *all* elementary and secondary schools within FUTA. Considering the total absence of any indication that Congress intended an alternative interpretation and noting, particularly, the necessity that the exceptions to coverage be construed narrowly, the U.S. Secretary of Labor's construction of the Act is virtually mandatory.

B.

LOUISIANA IS REQUIRED TO ADHERE TO THE U.S. SECRETARY OF LABOR'S INTERPRETATION OF 26 U.S.C.A. §3309(b), AS MODIFIED BY P.L. 94-566.

In the present case, the State has for many years maintained an unemployment compensation program upon which a large number of employees depend. If Louisiana should fail to remain in accord with FUTA regulations, it risks decertification of its program and the substantial hardship to Louisiana employers and employees which would result from termination of its FUTA benefits. Thus, while initial participation in FUTA is voluntary, once a state has established an unemployment compensation program, it is compelled to conform its

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* According to the Census Bureau's *Statistical Abstract of the United States* (1977 ed.) there were 261,000 full-time teachers in nonprofit elementary and secondary schools in 1975 of which 150,000 were in Roman Catholic schools. PP. 145, 147, tables 235, 237.

program to FUTA regulations, as they may be amended from time to time.

The fact that the states are under compulsion to adopt the U.S. Secretary of Labor's interpretation of the modification of §3309(b) is evidenced by the directive from the U.S. Department of Labor to "All State Employment Security Agencies" from Lawrence W. Rogers, Administrator of Field Operations (herein "the Directive"). The Directive states that "Secretary Marshall's decision concerning unemployment insurance coverage of services performed for church-related schools . . . was clearly intended to result in State coverage of church-related elementary and secondary schools." The Secretary's interpretation was not merely advisory. On the contrary, the Secretary was fully justified in expecting total compliance by the states.

In order to remain consistent with Federal requirements essential to certification of Louisiana's Unemployment Compensation Program, the Legislature adopted the identical language of 26 U.S.C.A. §3309(b) (P.L. 94-566) in passing Act 745 of 1977, effective January 1, 1978, which amended R.S. 23:1472(12) (F) (III)(a).

C.

THE DELETION OF THE PHRASE, "IN THE EMPLOY OF A SCHOOL WHICH IS NOT AN INSTITUTION OF HIGHER EDUCATION", BY THE LOUISIANA LEGISLATURE IN ITS 1977 AMENDMENT OF R.S. 23:1472(12)(F)(III), RENDERED SECTION 1472 (12)(F)(III) UNCLEAR AND AMBIGUOUS, AS DID THE REPEAL OF 26 U.S.C.A. §3309(b)(3) BY THE ENACTMENT OF P.L. 94-566 BY CONGRESS.

In 1970 Congress repealed the exemption from coverage which religiously affiliated colleges and universities had enjoyed before the effective date of the 1976 Amendments to FUTA. The 1970 FUTA Amendments left intact the exemptions in favor of elementary and secondary schools which were religiously affiliated. That Congress intended to leave the elementary and secondary religiously affiliated schools exemption intact when it passed the 1970 FUTA Amendments is best proved by the language of the following reports: House Ways and Means Committee Report 612 of the First Session of the Ninety-First Congress; House Ways and Means Committee Report 755 of the First Session of the Ninety-Fourth Congress; and Senate Report 1265 of the Second Session of the Ninety-Fourth Congress, quoted in pertinent part, supra.

La. R.S. 23:1472(12)(F)(III)(a,b,c), before the enactment of Act 745 of 1977 provided as follows:

> "III. For the purposes of subparagraphs (I) and (II) of this paragraph, the term 'employment' does not apply to service performed;
>
> a. in the employ of (i) a church or convention or association of churches, or (ii) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches; or
>
> b. by a duly ordained, commissioned or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or
>
> c. in the employ of a school which is not an institution of higher education."

Act 745 of 1977 deleted sub-paragraph "c" above, just as P.L. 94-566 deleted the identical language from 26 U.S.C.A. §3309(b)(3). Both the federal and state statutes were rendered unclear and ambiguous by the deletions of the precise language the phrase "of a school", leaving for interpretation the meaning of the phrase "of a church . . . or an organization which is operated primarily for religious purposes . . ." Because the term "church" was not defined by the statutes, the threshold issue presented in any instance in which an entity is asserting an exemption is whether the employing entity is a "church". The same reasoning applies to the term "religious purposes." When it is necessary to rely on extrinsic sources to determine the meaning of terms such as "church" and "religious purposes" in statutes, it is incorrect, as a matter of law, to observe or hold that the statutes are free of ambiguity, thus rendering inapplicable the legislative history as an additional extrinsic source as a tool of interpretation. The Courts below had no qualms about utilizing two extrinsic sources, i.e., uncontradicted testimony of plaintiffs' and intervenors' witnesses and "the record . . . without contradiction", as tools of interpretation to reach the conclusion that exemption contained in Section 1272(12)(F)(III)(a) applied to church and/or religious organizations which own and/or operate elementary and secondary schools. Nowhere in the reasoning of either Court below are the terms "church" and "religious purposes" defined, at least as far as this writer can perceive. Having utilized the extrinsic sources stated previously, the Courts below had a duty to also utilize Congressional Reports which were excerpted and cited in defendant-appellant-applicant's briefs and their failure and refusal to do so

constitute grave enough error to warrant the issuance of a Writ of Certiorari.

ARGUMENT ON SECOND ASSIGNMENT OF ERROR

FAILING TO GIVE ANY CONSIDERATION TO THE AUTHORITATIVE INTERPRETATION OF THE SUPREME COURT OF SOUTH DAKOTA IN LITIGATION CONTESTING THE IDENTICALLY WORDED STATUTE OF THAT STATE, WHICH DECISION HELD THE STATUTE VALIDLY REMOVED THE CHURCH SCHOOL EXEMPTION.

The several states of the Union enacted "conforming" legislation using the text of the Secretary of Labor's "suggested legislation", furnished to the states by the Secretary after the enactment of the 1970 Amendments to FUTA. Again, after the enactment of P.L. 94-566, being the 1976 Amendments to FUTA, the states, a few excepted, enacted "conforming" legislation so that state statutes would not be inconsistent with federal enactments. The statutes of two states, namely Louisiana and South Dakota, are set out below as they were phrased before the passage of P.L. 94-566.

South Dakota Civil Laws 61-1-10.4

"For the purpose of §§61-1-10.2 and 61-1-10.3 the term 'employment' does not apply to service performed:

"(1) In the employ of

(a) a church or convention or association of churches, or

(b) an organization which is operated primarily

for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches; or

"(2) By a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or

"(3) In the employ of a school *other than a state school* which is not an institution of higher education."

La. R.S. 23:1472(12) F (III) (a, b, c).

"III. For the purposes of subparagraphs (I) and (II) of this paragraph, the term 'employment' does not apply to service performed;

a. in the employ of (i) a church or convention or association of churches, or (ii) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches; or

b. by a duly ordained, commissioned or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or

c. in the employ of a school which is not an institution of higher education.

Act 745 of the 1977 Louisiana Legislature and H. 587, L. 1977 of the South Dakota Legislature employ identical language for the amended Paragraph III, in the Louisiana legislation and the amended Paragraph 10.4, in the South Dakota legislation. It is therefore an inescapable conclusion that at least the legislatures of Lou-

isiana and South Dakota repealed the exemption language after having been "suggested" to doing so by the U.S. Secretary of Labor.

The South Dakota Supreme Court, on March 27, 1980, upheld the state statute, which was mandated by the 1976 Congressional enactment, in the proceedings entitled *"In the Matter of the Determination of Unemployment Insurance Coverage of Northwestern Lutheran Academy and St. Martin's Evangelical Lutheran School"*, ____ S.D. ____, 290 N.W. 2d 845 (1980). A copy of the South Dakota decision was annexed as an exhibit to defendant-appellant-applicant's supplemental brief in the Court of Appeal and its impact on this controversy was called to the attention of the Court. However, it is apparent that no consideration was given to the South Dakota Supreme Court decision and rationale although it is the highest appellate court, either state or federal, which has thus far ruled on the issue of coverage of church related schools. The South Dakota Supreme Court sized up the issue thusly:

> "The threshold question on appeal involves a determination of congressional intent with respect to the repeal of Section 3309(b)(3) of FUTA (which resulted in the effective repeal of SDCL 61-1-10.4(3))."

The church school litigants contended that the removal of the exclusion from unemployment compensation tax liability for school employment was meant only to extend coverage to private, nonparochial schools and did not affect the exclusion from coverage of parochial schools. The Supreme Court observed that "an examination of the recent legislative background of FUTA, how-

ever, indicates otherwise" and quoted the same Congressional committee reports which defendant-appellant-applicant excerpted and cited in its brief filed with the Court of Appeal, the Court concluding as follows:

> "We conclude from our reading of the 1970 congressional revisions and the accompanying legislative reports that Congress expected the 'operated primarily for religious purposes' language in section 3309 (b)(1)(B) (corresponding to that in SDCL 61-1-10.4(1)(b)) to be narrowly construed, at least as applied to educational institutions. The Department of Labor has adhered to this congressional mandate and consistently interpreted the 1970 amendments as requiring state unemployment coverage of all institutions of higher education except for the narrow category including seminaries and novitiates which are devoted exclusively to religious training and indoctrination.
>
> "In view of Congress' apparent intention in 1970 to bring religiously affiliated institutions of higher education within coverage, and in light of the Labor Department's subsequent adoption of this interpretation, Congress' description of the objective behind the 1976 repeal of Section 3309(b)(3) (culminating in the repeal of SDCL 61-1-10.4(3)) is informative. According to Congress, the repeal of this section "has the affect of requiring the State to pay unemployment compensation on the basis of services performed for *all* educational institutions. Under existing law, the State is only required to provide coverage of services performed for institutions of higher education." H.R. Rep. No. 755, 94th Cong., 1st Sess. 6(1975). (emphasis supplied) "As stated in the Senate Report on the bill:
>
> > The bill would require the State to extend the coverage of their unemployment compensation

programs to employees of nonprofit elementary and secondary schools (present law requires coverage for employees of institutions of higher education). The provisions for non-payment of benefits during vacation periods to school employees of State and local governments would also apply to employees of nonprofit schools.

"It is further significant that S. Rep. No. 1265, 94th Cong. 2d Sess., 8 (1976) estimated the number of new employees who would be covered as a result of the repeal of Section 3309(b)(3) at 242,000. This figure approximates the total number of teachers in all nonprofit elementary and secondary schools. Absent the inclusion of employees of church-related elementary and secondary schools, the figure would be considerably less than 242,000, because the teachers in such schools comprise more than half of the staff of all nonpublic and elementary and secondary schools in the United States.*

"Moreover, when faced with the problem of statutory construction, we must show great deference to the interpretation given such statutes by the agency charged with their administration. Udall V. Tallman, 380 U.S. 1, 85 S. Ct. 792, 13 L. Ed. 2d 616 (1965). Shortly after the enactment of the 1970 amendments, the Department published its interpretation of those amendments which stated that the exemption for services performed for churches or religious organizations did not extend to services performed for religiously affiliated institutions of

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* According to the Census Bureau's *Statistical Abstract* of the United States (1977), there were 261,000 full-time teachers in nonprofit elementary and secondary schools, in 1975 of which 150,000 were in Roman Catholic Schools. Thus, it is clear that Congress contemplated that the repeal of §3309(b)(3) would bring full elementary and secondary schools within the ambit of FUTA.]

> higher education. The Department's view of the objective behind the 1976 amendments, expressed in the Secretary's letter, supra, is a logical and necessary extension of the position of which the Department has taken without objection since 1970. We find further significance in the fact that Congress did not attempt in 1976 to alter the Department's interpretation of §3309(b)(1). The "failure of Congress to alter or amend . . . [a] section, notwithstanding this consistent construction by the department charged with its enforcement, creates a presumption in favor of the administrative interpretation, to which we should give great weight, even if we doubted the correctness of the ruling of the Department of Labor". Costanzo v. Tillinghast, 287 U.S. 341, 345, 53 S. Ct. 152, 154, 77 L. Ed. 350, 353 (1932)." CCH, Unemployment Insurance Reports, #21,589, pp. 3860, 3861.

The Court of Appeal should have considered, as persuasive, the South Dakota Supreme Court rationale and decision in construing the statute which is the subject of this litigation because the language of both the South Dakota and the Louisiana statutes is cloned from FUTA and is the Court's failure to so consider it constitutes error. *McNamara v. Leslie Ardoin, Inc.*, 357 So.2d 1317, 1322 (La. App. 3 Cir., 1978), Writs Refused 359 So.2d 622; and *Beckham v. Hartford Accident & Indemnity Company*, 137 So.2d 99, 101 (La. App. 3 Cir., 1962).

Northwestern Lutheran Academy and St. Martin's Evangelical Lutheran (Church) School has filed an application for Writ in the U.S. Supreme Court, which application was docketed on July 25, 1980 as No. 80-120. The U.S. Department of Justice has filed its brief with the

High Court, also urging the Court to grant certiorari. The brief by Justice Department was filed as requested by the U. S. Secretary of Labor. At the time of the filing of this Application the Federal Supreme Court has not acted on the application in the South Dakota case.

ARGUMENT ON THIRD ASSIGNMENT OF ERROR

FAILING TO RECOGNIZE AND APPLY THE LOUISIANA JURSIPRUDENTIAL PRINCIPLE THAT WHEN THE LOUISIANA LEGISLATURE PASSES, VERBATIM A FEDERAL STATUTE, THE LEGISLATURE AUTOMATICALLY ADOPTS THE FEDERAL INTERPRETATION OF THE STATUTE AND STATE AGENCIES AND COURTS CANNOT VALIDLY INTERPRET THE STATE STATUTE CONTRARY TO FEDERAL INTERPRETATION.

Beckham, supra, was decided unanimously by an En Banc Court. The Court was confronted with the issue of interpreting Articles 966 and 968 of the Code of Civil Procedure, dealing with Summary Judgment and Judgment on the Pleadings. Culpepper, J., for the Court, observed, in pertinent part, as follows:

> "An understanding of the problem necessitates a brief review of the history of Rule 56 of the Fed. Rules of Civil Procedure, . . . on which our own summary judgment procedure, . . . , is largely based.
>
> ". . . . .
>
> "However, Federal Rule 56(c) was omitted from our Code of Civil Procedure. . . .

"Applicable here is the rule of statutory construction that where our Legislature adopts a new law, using as a source a statute which has already been adopted in another state or by our Federal Government, and omits provisions of said source statute, then it must be construed that the intention of our legislature was not to adopt the omitted portion. Simmesport State Bank v. Scallan, 134 So.2d 391 (3rd Cir., App. 1961).

"Applying the above principal (sic) of law to the instant case, it is apparent that our legislature and the redactors of our Code of Civil Procedure intentionally omitted, as unnecessary in Louisiana, any provision for summary judgment on the issue of liability alone. . . ."

137 So.2d 99, 101, 102. (deletions and parenthetical matter by the writer). ACCORD: *Louisiana Civil Service League v. Forbes*, 258 La. 390, 246 So.2d 800 (1971).

McNamara involved a state tax statute which was patterned after a federal tax statute. Domengeaux, J., for the Court, reversed the District Court judgment and ruled in the taxpayer's favor, reasoning, in pertinent part, as follows:

"At the outset we note that, as a basic rule of statutory interpretation, when legislation is patterned after federal law, Louisiana courts may look to federal interpretations in order to ascertain the meaning and application of the statutes in question. (citations omitted). We also note that, on at least one occasion, when the Louisiana Supreme Court was faced with interpreting a state income tax provision copied from the federal act, they found that the Louisiana Legislature intended to incorporate into Louisiana law the federal regulations and court

decisions surrounding the federal provisions at the time of adoption. *Standard Oil Company of New Jersey v. Collector of Revenue*, 210 La. 428, 27 So.2d 268 (1946). Finally, we note that in taxing legislation, exemptions must be strictly construed, and clearly, unequivocally, and affirmatively established. (citations omitted).

"We now proceed to examine the history of the statutes in question. The Louisiana income tax law came into existence by virtue of Act No. 21 of 1934. To a large extent, it was patterned after the federal internal revenue code in existence at that time. The provision dealing with exemptions from the tax was found in Section 27 of the Act. . . . When Section 27 is compared with the equivalent federal provision in existence during 1934, . . . , it is seen that the Louisiana legislation is almost a verbatim copy of the federal act. We therefore are justified in turning to federal interpretations of the provision.

"Treasury regulation Art. 522 . . . , in effect during 1934, provided the following: (text omitted).

"The validity of the federal regulation is not questioned, and we assume that it is a correct interpretation of the federal statute. Under rules of statutory interpretation, it is clear that the Louisiana Legislature intended to exempt only those agricultural organizations which qualified under Treasury regulation Art. 522 . . . , in effect in 1934. . . .

"In addition to these rules of statutory interpretation, we find specific support for this view in the Louisiana Supreme Court's decision in *Standard Oil Co. of New Jersey v. Collector of Revenue*, supra, which is the legal enantiomorph of the instant controversy. *In Standard Oil, the validity of a state regulation* was in question. The Collector of Reve-

nue has promulgated a regulation which differed from the corresponding federal regulation. The Court invalidated the state regulation and stated that when the Louisiana Legislature passed a verbatim copy of the federal act, the federal interpretation of the statute was also adopted. As such, the state regulation could not differ from the federal regulation. In the instant case, the state regulation parallels the federal regulation. It follows from the principles set forth in Standard Oil that the regulation is a proper interpretation of the statute and should be applied to this case. Defendant is not exempt from the payment of state income tax." 357 So.2d 1317, 1319-1322. (Italic supplied by the writer).

The Connecticut Supreme Court, in *State v. Elliott*, 177 Conn. 1, 411 A.2d 3 (1979), was confronted with the problem of interpreting a Connecticut statute which adopted the "extreme emotional distress" defense in criminal proceedings. The Connecticut statute was adopted virtually verbatim from the New York Murder Statute which had been interpreted by the Court of Appeal of New York (that state's highest appellate court) and by the Supreme Court of the United States. The Connecticut Supreme Court adopted the interpretation placed on the "borrowed" statute by the courts of the "lender" state, reasoning in part, that:

> "The fact that a statute is almost a literal copy of a statute of a sister state is persuasive evidence of a practical reenactment of the statute of the sister state; as such it is proper to resort to decisions of a sister court construing that statutory language. *Witherspoon v. Salm*, 251 Ind. 575, 243 N.E.2d 876 (1969); *82 C.J.S., "Statutes"*, §371; *73 Am.Jur.2d, "Statutes"*, §166; *People v. Connally*, 36

Cal.App.3rd 379, 111 Cal.Rptr. 409 (1973)." 411 A.2d 3,6.

82 C.J.S., "Statutes", § 371, cited in *Elliott* supra, provides, in pertinent part, as follows:

". . . . .

"Where a legislature adopts a federal statute verbatim, the history of the law and the intent of congress when it adopted the provision have a bearing on the intent of the legislature, and it may be presumed that the legislature knew of the interpretation placed on the provision as expressed during the debates when before Congress for adoption, had the same objectives in mind, and employed the statutory terms in the same sense. [citing: American National Insurance Co. v. Keitel, 352 Mo. 1107, 186 S.W.2d 447; In re Walk's Estate, 79 N.Y.S.2d 645, 192 Misc. 237; Dawson v. Tobin, 74 N.D. 713, 24 N.W.2d 737; Shirk v. Simco, 200 S.W.2d 704, reversed on other grounds, 146 Tex.259, 206 S.W.2d 221]. *So where the adoption of an amendment to the state act follows shortly after the adoption of an amendment to the federal act, and the two are couched in almost identical language, it may be assumed that both had the same purpose.* [citing: Dupuy v. McColgan, 112 Cal.App.2d 237, 246 P.2d 155; Home Beneficial Life Ins. Co. v. Unemployment Compensation Commission, 181 Va. 811, 27 S.E.2d 159]. *In construing a tax law enacted after the passage of a similar law by the federal government, the state court will not consider the fact that only that part of the federal law which is favorable to the state was adopted and the part favorable to the taxpayer was ignored or eliminated;* . . . [citing: Rathbone v. Collector of Revenue, 196 La. 795, 200 So. 149].

". . . . .

". . . . .

". . . . . Rulings of administrative bodies having the responsibility, in the original jurisdiction, of enforcing the adopted statute are not binding on the courts of the adopting jurisdiction, although great weight is usually given to such rulings. [citing: Briggs & Co. v. District of Columbia, 196 F.2d 241; Unemployment Compensation Commission of North Carolina v. Wachovia Bank & Trust Co., 215 N.C. 491, 2 S.E. 2d 592; Saunders v. Maryland Unemployment Compensation Board, 188 Md. 677, 53 A.2d 579; and other cases]. . . . . ." (Emphasis, brackets, and deletions by the writer).

82 C.J.S. "Statutes", §373(b), states, in pertinent part, as follows:

"It is the construction of the statute which prevailed in the original state at the time of its adoption by the other state that is presumed to follow the statute, and *subsequent decisions have no controlling effect on the adopting state, although they may be strongly persuasive, and will be followed where they are considered to give true force and effect to the statute,* and the judicial construction existing where the statute was adopted was not well known, definite, and settled, or its application uniform. [citing numerous cases]." (Emphasis and brackets by the writer).

SUMMARY

The uniform nature of the legislation which is the subject of this litigation is readily apparent as evidenced by a comparison of the South Dakota and Louisiana legislation. The reason is quite simple: both states enacted the language of the U.S. Department of Labor's "Sug-

gested Legislation" rather than face the certainty of having their unemployment benefits programs decertified by the U.S. Secretary of Labor, with the resultant loss of administration funds and the loss to the state's employers of the tax benefits which would necessarily and logically follow a decertification of the state's unemployment benefits programs. One follows the other as surely as night follows daylight.

The intent of Congress was manifested by various reports of the committees of Congress which considered the measure which became known as Public Law 95-566, the 1976 Amendments to FUTA. The pertinent excerpts from Congressional committee reports were an integral part of defendant-appellant's Original Brief. Those excerpts make it quite plain that Congress intended to wipe out the exemptions which church related schools of the elementary and secondary variety had enjoyed prior to the taking effect of P.L. 94-566. The Louisiana Legislature adopted the U.S. Department of Labor's "Suggested Legislation" under threat of losing federal funding and tax benefits to the state's employers, "whole hog", or "hook, line, and sinker". The South Dakota Supreme Court saw the mandated legislation for what it was and correctly decided that Congressional intent was to be used to determine the intent of the South Dakota Legislature in its enacting the legislation mandated upon it.

This Court, in *Standard Oil Co. of New Jersey v. Collector of Revenue*, supra, voided a state regulation which differed from the corresponding federal regulation interpretative of a statute which the Louisiana Legislature enacted verbatim from a federal statute. The fed-

eral interpretation of the statute was also adopted and the state was powerless to promulgate a regulation which differed from the federal regulation interpreting the federal statute. In the case at Bar the state statute and the federal statute provide for the same thing and the federal statute has been authoritatively interpreted by the U.S. Secretary of Labor since at least 1970 in such a way as to eliminate exemptions which had been the main obstacle to universal coverage by the unemployment compensation laws of the Congress and of the several states.

The failure of the Court of Appeal to consider the well-reasoned opinion of the South Dakota Supreme Court and its failure to give proper consideration, if any was given, to the intention of Congress as evidenced by the various reports of the committees of Congress, was clearly erroneous and this Court should therefore grant certiorari in this matter.

Defendant-appellant-applicant makes no attempt to delude Your Honors into believing that the reasoning and result in the South Dakota litigation is the only other case which has decided the identical issue presented in the case at Bar. The North Dakota Supreme Court, in a 5-0 decision, used the same basic approach as did the First Circuit Court of Appeal in reaching the same result, namely that church schools have not lost their exempt status. *Grace Lutheran Church Corp. (Grace Lutheran School) v. North Dakota Unemployment Compensation Division*, Docket No. 9719, CCH, Unemployment Insurance Reports, #21,592, pp. 3877 et seq., a copy of which is attached to this Application as Appendix "A". The Court reasoned, in part as follows:

"In repealing the exemption for services performed in the employ of a school which is not an institution of higher education; it is clear that public and private (non-church) elementary and secondary schools were covered by the unemployment compensation legislation. . . .

". . . . .

". . . Congress, in deleting §3309(b)(3) expressed no *specific* intent to require states to tax Christian schools. . . .

"Therefore, since Congress made no specific, express reference to church schools when deleting §2209(b)(3), and since a persuasive argument can be made that church schools, such as Grace Lutheran, are excluded under §3309(b)(1), the required 'clear expression of an affirmative intention of Congress' that church schools should pay unemployment tax appears to be lacking.

"Applying the same rules of construction in considering the repeal of §52-01-01(13)(L)(3), NDCC, we reach the same conclusion. . . .

". . . The clear and unambiguous language of §52-01-01(13)(L)(1)(a) provides an exemption for services performed in the employ of 'a church or convention or association of churches'. The removal of §52-01-01(13)(L)(3) did not ipso facto remove the other exemption. . . ." _____ N.D. _____, 295 N.W.2d 767, CCH, Unemployment Insurance Reports, #21,592, pp. 3877, 3879, 3880. (Emphasis by the Court).

The North Dakota Supreme Court decision will not be the subject of an Application for Writs to the U.S. Supreme Court, according to information furnished the writer on September 22, 1980 by the attorney for the North Dakota Employment Security Agency. One point

urged by the U.S. Department of Justice in its brief in support of granting certiorari in the South Dakota case is the opposite result reached in the North Dakota litigation.

A careful reading of the South Dakota case reveals that four of the Court's five Justices felt that the federal legislation, from which the South Dakota statute was cloned, was not couched in such "clear and unambiguous language" as to make it unnecessary to utilize extrinsic sources to ascertain the intent of Congress when it enacted P.L. 94-566 which, inter alia, repealed 26 U.S.C.A. §3309(b)(3). The extrinsic sources relied on by the majority in the South Dakota Case were the very same Congressional Committee Reports excerpted and cited in defendant-appellant-applicant's briefs in the Courts below and which were summarily rejected as being inappropriate or unnecessary to a resolution of the legal issues. A copy of the South Dakota decision was appended to applicant's Supplemental Brief in the Court of Appeal.

The United States Court of Appeals for the Fifth Circuit has held that church related schools still remain exempted from unemployment compensation laws. *Alabama v. Marshall*, Docket No. 79-3968 and *Nevada v. Marshall*, Docket No. 4032, consolidated for decision, September 8, 1980. Judge Garza, for the panel consisting of Coleman, Roney, and Garza, J. J., reasoned, in part, in the unanimous decision, as follows:

> "Although both sides of this case point to evidence of Congressional intent favoring their positions, the law is well settled that a statute must be interpreted according to its plain language unless a

clear contrary legislative intention is shown. *See NLRB v. Catholic Bishop, supra; U.S. v. Apfelbaum,* ____ U.S. ____ (1980). Regarding §3309(b)(1)(A), we can find no clear Congressional intention to desire a result contrary to its plain language. The statute plainly indicates that the exemption is contingent upon who the employer is and is not contingent upon the type of services the employee is performing. There is no question here that the persons performing services in these religious schools fall within the 'in the employ of' language of the statute, therefore, if the employees involved are employed by a 'church', the exemption applies to them. Resolution of this question depends upon what is meant by 'church' as used in the statute. We are convinced that the plain meaning of 'church' requires a definition as something qualitatively greater than the physical building of worship and, at a minimum, the term encompasses the legal entity commonly referred to as a church. The Secretary would avoid the legal consequences of this definition by excluding the very people which comprise a church as an entity and perform its functions. For this court to adopt such a limited definition would be for us to ignore the historic function of churches and defy the definition of the word as used in our vocabulary.

If Congress desires to change the established exemption of unemployment compensation coverage for elementary and secondary parochial school employees, it is well within its ability to amend the law to reflect that desire by drafting a clear statement to that effect. But, it is not the responsibility or function of this court to perform linguistic gymnastics in order to upset the plain language of Congress as it exists today."

A copy of the "slip opinion" of the U.S. Court of

Appeals' decision is attached to this Application as Appendix "B".

The question of coverage of church related schools by unemployment compensation laws has been heard and decided by four appellate courts, namely The First Circuit Court of Appeal of Louisiana, The U.S. Court of Appeals for the Fifth Circuit, The South Dakota Supreme Court, and the North Dakota Supreme Court. Of the state appellate courts of last resort which have decided the issue, one held, in a 4-1 decision, that church related schools were no longer exempt, and the other held that their exempt status remained intact. Both of the two intermediate appellate courts, one state and one federal, have decided the issue in favor of the church related schools; neither one pitched its decision of First Amendment grounds. Contrariwise, the appellate courts of the Dakotas (neither state having an intermediate appellate court system) have decided the cases, in the alternative, on First Amendment grounds. South Dakota's Supreme Court held the schools were covered and further held, in the alternative, that the necessary increase in the involvement between the state and the schools ". . . does not constitute excessive entanglement violative of the First Amendment." ____ S.D. ____, 290 N.W.2d 845, 851 (1980). A copy of the South Dakota decision is attached to this application as Appendix "C".

The North Dakota Supreme Court held the schools were not covered but reasoned that if coverage had been accomplished by the 1976 Amendments to FUTA and by the North Dakota legislation "the end result of including church schools in unemployment compensation legislation raises serious questions as to excessive governmen-

tal entanglement with religion" which is, under the facts found, "the type of entanglement prohibited by the First Amendment to the Constitution". *CCH, Unemployment Insurance Reports*, #21,592, p. 3882, ____ N.D. ____, ____ N.W.2d ____ (1980).

Of the four appellate courts which have considered the coverage issue, the South Dakota Court found the federal and state laws ambiguous and used extrinsic sources in interpreting the laws by ascertaining the legislative intent. The North Dakota Court found the statutes, federal and state, "clear and unambiguous." The Fifth Circuit Court of Appeals reasoned that the "plain language" used by Congress in 26 U.S.C.A. §3309(b) "plainly indicates that the exemption is contingent upon who the employer is and is not contingent upon the type of services the employee is performing" and, in refusing to consider extrinsic sources, the Congressional Committee Reports, relied on by the Secretary of Labor to establish that the legislative intent on Congress in repealing Section 3309(b)(3) was in line with the Secretary's interpretation, tersely stated "But, it is not the responsibility or function of this court to perform linguistic gymnastics in order to upset the plain language of Congress as it exists today".

The Court of Appeal, in the case at Bar, opined that "the trial judge was correct" when he reasoned that "the language of LSA R.S. 23:1472(12)F.III(a) is clear and unambiguous and obviously means that the institutions in question are not subject to the tax".

WHEREFORE, petitioner prays that a Writ of Certiorari issue to the Honorable Judges of the First Circuit Court of Appeal directing that a certified copy of

the proceedings entitled "The Roman Catholic Church of the Archdiocese of New Orleans; The Congregation of St. Julian Eymard Roman Catholic Church and Brothers of the Sacred Heart (Brother Martin High School) versus State of Louisiana, Department of Labor, Office of Employment Security", Docket No. 13,541, be sent to this Court, that the judgment be reviewed, and, after due consideration, that the judgment of the First Circuit Court of Appeal be reversed.

Respectfully submitted,
/s/ WILLIE D. MAYNOR
WILLIE D. MAYNOR,
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Baton Rouge, Louisiana 70804
Telephone: (504) 342-3044
ATTORNEY FOR DEFENDANT-
APPELLANT-APPLICANT

VERIFICATION

State of Louisiana
Parish of East Baton Rouge

Before me, personally appeared Willie D. Maynor, who deposed that he is the attorney for the State of Louisiana, Department of Labor, Office of Employment Security, petitioner; that all allegations in his foregoing petition are true and correct, and that a copy of this petition has been served upon Thomas A. Rayer, Esq., William R. D'Armond, Esq., and Hugh T. Ward, Esq., attorneys for plaintiffs and intervenors, on October ____, 1980, by placing a copy of it addressed to each of them, in the U.S. Mail.

/s/ WILLIE D. MAYNOR
WILLIE D. MAYNOR

SWORN TO AND SUBSCRIBED Before me, Notary, this _____ day of October, 1980 at Baton Rouge, Louisiana.

/s/ JAMES A. McGRAW
JAMES A. McGRAW, NOTARY PUBLIC

Appendix G

No. 12801

Supreme Court of South Dakota

IN THE MATTER OF THE DETERMINATION OF UNEMPLOYMENT INSURANCE COVERAGE OF NORTHWESTERN LUTHERAN ACADEMY AND ST. MARTIN'S EVANGELICAL LUTHERAN SCHOOL

Argued Oct. 10, 1979.
Decided March 26, 1980.
Rehearing Denied May 2, 1980.

FOSHEIM, Justice.

The State of South Dakota appeals from a judgment of the circuit court exempting respondents Northwestern Lutheran Academy and St. Martin's Evangelical Lutheran School from liability for payment of unemployment tax on their school personnel. We reverse.

Northwestern Lutheran Academy (NLA) is a four-year preparatory school for entrance to Northwestern College or Dr. Martin Luther College. At these latter institutions, students are trained for the ministry of the Wisconsin Evangelical Lutheran Synod. St. Martin's Evangelical Lutheran School (St. Martin's) is an elementary school operated by St. Martin's Evangelical Lutheran Church.[1] Both respondent schools have four or

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[1] NLA, owned and operated by the Wisconsin Synod, and St. Martin's Church, separately incorporated as a church under South Dakota law, are both members of the Wisconsin Synod and exempt from income tax liability under Section 501 of the Internal Revenue Code (26 U.S.C.A. §501) (1967).

more employees exclusive of those found to be ordained, commissioned or licensed ministers in the exercise of their ministry.

Prior to January 1, 1978, the Federal Unemployment Tax Act (FUTA) permitted states to exempt certain services from taxation.[2] These exemptions from unemployment tax liability were codified in South Dakota in SDCL 61-1-10.4, which provided that employment covered did not include services performed:

* * * * * * * *

(1) In the employ of

(a) a church or convention or association of churches, or

(b) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches; or

(2) By a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or

(3) In the employ of a school other than a state school which is not an institution of higher education[.]

* * * * * * * *

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[2] 26 U.S.C.A. § 3301 et seq. FUTA is a comprehensive plan for unemployment compensation allowing for state and federal participation in its administration. Section 3301 of the Act imposes a federal unemployment tax, but Section 3302 of the Act permits tax credits against the federal tax for employers who have paid money into federally approved state unemployment tax funds. In order for a state to participate in the federal plan, it must meet certain requirements set out under Sections 3303 and 3304. While the respon-

In 1976, Congress amended FUTA[3] and, as required by that amendment, the South Dakota Legislature in effect repealed subsection (3) of SDCL 61-1-10.4.

In April of 1978, the Secretary of Labor, charged with administration of FUTA, was called upon to determine whether church-related schools were exempt from state unemployment tax under Section 3309(b)(1) (corresponding to SDCL 61-1-10.4(1). The Secretary's opinion, announced in a letter of April 18, 1978, addressed to the Most Reverend Thomas C. Kelly, General Secretary of the United States Catholic Conference, declared:

> The repeal by Congress of the exclusion, in Section 3309(b)(3) of the Federal Unemployment Tax Act, of employees of elementary and secondary schools was clearly intended to result in State coverage of church related schools, whose employees constitute over 80% of the employees of all non-profit schools. In light of the repeal of 3309(b)(3), we think the only services performed in the schools that may reasonably be considered within the scope of the exclusion permitted by 3309(b)(1) are those strictly church duties performed by church employees pursuant to their religious responsibilities within the school.

The Secretary's opinion resulted in a directive issued to all state employment agencies participating in the federal program, requiring such agencies to be able to assess unemployment compensation taxes against

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dents are exempted from the federal unemployment tax by Section 3306(c)(8). Sections 3304(a)(6) and 3309 require participating states to tax certain charitable organizations exempted from the federal tax.

[3] The Unemployment Compensation Amendments Act of 1976, Pub.L.No. 94-566, 90 Stat. 2667.

church-related schools in their states. The extension of this coverage under state law is a mandatory condition precedent to certification by the Secretary of Labor that the state statute conforms to federal standards; the Secretary's certification, in turn, provides access to the system of tax credits and federal reimbursement of certain benefit costs.

The State of South Dakota, in order to continue its participation in FUTA, issued a determination that both NLA and St. Martin's School are employers subject to coverage by the South Dakota Unemployment Insurance Law. This decision was reviewed by the Appeals Referee for the South Dakota Department of Labor whose decision found the schools subject to coverage, but that pastors and male teachers were exempt from coverage as ministers of a church in the exercise of their ministry, under SDCL 61-1-10.4(2). On appeal to the circuit court, the Appeals Referee was reversed and NLA and St. Martin's were both found to be exempt from coverage under the South Dakota Unemployment Insurance Law.

I

[1] The threshold question on appeal involves a determination of congressional intent with respect to the repeal of Section 3309(b)(3) of FUTA (which resulted in the effective repeal of SDCL 61-1-10.4(3)). Respondents submit that the removal of the exclusion from unemployment compensation tax liability for school employment was meant only to extend coverage to private, nonparochial schools and did not affect the exclusion from coverage of parochial schools. An examination of the recent legislative background of FUTA, however, indicates otherwise. The Employment Security

Amendments of 1970, by adding new language to various sections of FUTA,[4] required state law coverage of individuals employed by nonprofit organizations (including institutions of higher education). The committee reports accompanying the amendments demonstrate that Congress intended to extend coverage to individuals employed in nonprofit organizations, including religious organizations. The House Ways and Means Committee explained that:

> Under existing Federal law, services performed for nonprofit *religious, charitable, educational* and humane organizations for a State and its political subdivisions are exempt from the tax provisions of the Federal Unemployment Tax Act. While employment in these organizations and governments is not subject to fluctuations to the same degree as in commerce and industry, unemployment affects a substantial number of their employees, particularly people working in nonprofessional occupations.
>
> Your committee does not want to change the present tax status of nonprofit organizations, but it is concerned about the need of their employees for protection against wage loss resulting from unemployment.

H.R. Rep. No. 612, 91 Cong., 1st Sess. 11 (1969) (emphasis supplied). The Committee went on to delineate more clearly the limits of the Section 3309(b)(1) exemption (correlative to SDCL 61-1-10.4(1)) as applied to institutions of higher education:

> This paragraph excludes services of persons where the employer is a church or convention or association of churches, but does not exclude certain ser-

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[4] §§ 3304(a)(6), 3306(c)(8) and 3309(a)(1)(A).

> vices performed for an organization which may be religious in orientation unless it is operated primarily for religious purposes and is operated, supervised, controlled, or principally supported by a church or (convention or association of churches). Thus, services of the janitor of a church would be excluded but services of a janitor for a separately incorporated college, although it may be church related, would be covered. A college devoted primarily to preparing students for the ministry would be exempt, as would a novitiate or house of study training candidates to become members of religious orders. On the other hand, a church related (separately incorporated) charitable organization (such as, for example, an orphanage or a home for the aged) would not be considered under this paragraph to be operated primarily for religious purposes.

H.R. Rep. No. 612, 91 Cong., 1st Sess. 44 (1969). Identical language is found in S. Rep. No. 752, 91 Cong., 2nd Sess. (1970), at 48-59, U.S. Code Cong. & Admin. News 1970, p. 3606.

We conclude from our reading of the 1970 congressional revisions and the accompanying legislative reports that Congress expected the "operated primarily for religious purposes" language in Section 3309(b)(1)(B) (corresponding to that in SDCL 61-1-10.4(1)(b)) to be narrowly construed, at least as applied to educational institutions. The Department of Labor has adhered to this congressional mandate and consistently interpreted the 1970 amendments as requiring state unemployment coverage of all institutions of higher education except for the narrow category including seminaries and novitiates which are devoted exclusively to religious training and indoctrination.

In view of Congress' apparent intention in 1970 to bring religiously affiliated institutions of higher education within coverage, and in light of the Labor Department's subsequent adoption of this interpretation, Congress' description of the objective behind the 1976 repeal of Section 3309(b)(3) (culminating in the repeal of SDCL 61-1-10.4(3)) is informative. According to Congress, the repeal of this section "has the effect of requiring the State to pay unemployment compensation on the basis of services performed for all educational institutions. Under existing law, the State is only required to provide coverage of services performed for institutions of higher education." H.R.Rep.No. 755, 94th Cong., 1st Sess. 6 (1975) (emphasis supplied). As stated in the Senate Report on the bill:

> The bill would require the State to extend the coverage of their unemployment compensation programs to employees of nonprofit elementary and secondary schools (present law requires coverage for employees of institutions of higher education). The provisions for nonpayment of benefits during vacation periods to school employees of State and local governments would also apply to employees of nonprofit schools.

S.Rep.No. 1265, 94th Cong., 2d Sess. 2 (1976), U.S. Code Cong. & Admin. News, pp. 5997, 5998.

It is further significant that S.Rep.No. 1265, 94th Cong., 2d Sess. 8 (1976) estimated the number of new employees who would be covered as a result of the repeal of Section 3309(b)(3) at 242,000. This figure approximates the total number of teachers in all nonprofit elementary and secondary schools. Absent the inclusion of employees of church-related elementary and secondary

schools, the figure would be considerably less than 242,000, because the teachers in such schools comprise more than half of the staff of all nonpublic elementary and secondary schools in the United States.[5]

[2] Moreover, when faced with the problem of statutory construction, we must show great deference to the interpretation given such statutes by the agency charged with their administration. *Udall v. Tallman*, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965). Shortly after the enactment of the 1970 amendments, the Department published its interpretation of those amendments which stated that the exemption for services performed for churches or religious organizations did not extend to services performed for religiously affiliated institutions of higher education. The Department's view of the objective behind the 1976 amendments, expressed in the Secretary's letter, supra, is a logical and necessary extension of the position which the Department has taken without objection since 1970. We find further significance in the fact that Congress did not attempt in 1976 to alter the Department's interpretation of Section 3309(b)(1). The "failure of Congress to alter or amend . . . [a] section, notwithstanding this consistent construction by the department charged with its enforcement, creates a presumption in favor of the administrative interpretation, to which we should give great weight, even if we doubted the correctness of the ruling

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[5] According to the Census Bureau's *Statistical Abstract of the United States* (1977), there were 261,000 full-time teachers in nonprofit elementary and secondary schools in 1975 of which 150,000 were in Roman Catholic Schools. Thus, it is clear that Congress contemplated that the repeal of § 3309(b)(3) would bring all elementary and secondary schools within the ambit of FUTA.

of the Department of Labor". *Costanzo v. Tillinghast*, 287 U.S. 341, 345, 53 S.Ct. 152, 154, 77 L.Ed.350, 353 (1932).

II

[3-5] Having arrived at this determination of congressional intent, we must decide whether the South Dakota Unemployment Compensation Law infringes respondents' freedom of religion guaranteed by the First Amendment to the United States Constitution and Article VI, Section 3 of the South Dakota Constitution. In order to demonstrate that legislation conflicts with the Free Exercise Clause, "it is necessary . . . for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." *School District of Abington v. Schempp*, 374 U.S. 203, 223, 83 S.Ct. 1560, 1572, 10 L.Ed.2d 844, 858 (1963). Although the First Amendment protection of religious belief is absolute, religiously based conduct "remains subject to regulation for the protection of society." *Cantwell v. Connecticut*, 310 U.S. 296, 303-304, 60 S.Ct. 900, 903, 84 L.Ed. 1213, 1218 (1940). Thus, legislation that inhibits conduct mandated by religious convictions, if justified by "interests of the highest order and those not otherwise served can overbalance legitimate claims for the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15, 25 (1972).

[6] Respondents do not outline any specific religious beliefs or practices that conflict with inclusion of their school personnel in the unemployment compensation program. Assuming, however, that their claim relates to the alleged financial burden that FUTA places upon them, they yet fail to meet their burden of demonstrat-

ing a violation of the Free Exercise Clause. The United States Supreme Court has refused to invalidate laws on free exercise grounds simply because they operate "so as to make the practice of . . . religious beliefs more expensive." *Braunfeld v. Brown*, 366 U.S. 599, 605, 81 S.Ct. 1144, 1147, 6 L.Ed.2d 563, 567 (1961). Neither does the unemployment insurance coverage in this case work in any manner to change the entire way of life of any persons associated with respondents. Cf., *Wisconsin v. Yoder*, supra. It is further significant that employers may meet their obligation by making reimbursement payments in lieu of contributions into the state unemployment compensation fund. *See:* Section 3304(a)(6)(b); Section 3309(a)(2). An employer electing the reimbursement method is liable only for those amounts paid out to former employees in the form of benefits. Such benefits are not automatically paid to all individuals who become unemployed; rather, certain eligibility requirements must be met before benefits are received and liability is incurred by an employer. This method, by which it is conceivable that no liability may occur, can not be characterized as "coercive" since it will have little, if any, impact upon respondents' religious practices.

Further, coverage of parochial school employees under the unemployment compensation tax law is permissible because it is justified by a compelling governmental interest. This interest is to provide a system of income maintenance for unemployed individuals so that they have the resources for food, shelter, and other necessities of life until they are able to secure other employment (or until the expiration of the statutorily pre-

scribed period for the receipt of benefits). The United States Supreme Court has repeatedly upheld social and regulatory programs which feature important governmental interests, even though such programs may have an incidental effect upon free exercise of religion. *Braunfeld v. Brown*, supra; *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961); *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944); *Reynolds v. United States*, 98 U.S. 145, L.Ed. 244 (1878). Of further relevance are cases which have held that the failure to grant tax exemptions to religious organizations did not violate the free exercise clause. See, e.g., *Watchtower Bible and Tract Society v. Los Angeles County*, 181 F.2d 739 (9th Cir. 1950), *cert. denied*, 340 U.S. 820, 71 S.Ct. 51, L.Ed. 602 (1950) (upholding state personal property tax levy upon religious literature). As noted in *Parker v. Commissioner*, 365 F.2d 792, 795 (8th Cir. 1966), *cert. denied*, 385 U.S. 1026, 87 S.Ct. 752, 17 L.Ed.2d 674 (1967):

> The receiving of an exemption is thus a matter of legislative grace and not a constitutional right. As long as exemptions are denied by the Commissioner upon a non-discriminatory basis using specific and reasonable guidelines and without inquiry into the merits of the particular religious doctrines, the withholding of religious exemptions is permissible under the Constitution.

Because the Secretary's interpretation of the amended statute, supra, avoids inquiry into the merits of any particular religious doctrine and will result in nondiscriminatory enforcement of FUTA as applied to all nonprofit elementary and secondary schools, the interpretation does not violate the Free Exercise Clause.

In *Mitchell v. Pilgrim Holiness Church Corp.*, 210 F.2d 879 (7th Cir. 1954), *cert. denied*, 347 U.S. 1013, 74 S.Ct. 867, 98 L.Ed. 1136, (1954) the court held that refusal to comply with the federal minimum wage law cannot be justified on religious grounds. The court there stated that the Fair Labor Standards Act "does not . . . *prohibit* the free exercise of religion by the defendant nor does it *lay a flat tax* on the privilege" (emphasis in original). 210 F.2d at 883. The court went on to state that the remedial character of the Fair Labor Standards Act—"to insure to the workers of the United States engaged in the production of goods for commerce a minimum wage sufficient to maintain a minimum standard of living"—justified any incidental impact upon their employer's free exercise of religion. Id., at 884. Similarly, in the present case, unemployment insurance coverage will have no more than a minimal impact on any religious practice. Further, the purposes of the unemployment compensation program—to insure that eligible persons will be able to maintain a minimum standard of living and that the detrimental effects of such unemployment will not have an adverse effect on the economy—are sufficiently compelling to overrride any incidental burden upon respondent's activities.

III

Respondents contend that removal of the exemption would foster excessive entanglement between church and state in violation of the First Amendment. It is true that the inclusion of certain employees under the state's unemployment insurance law will necessarily call for increased involvement between the state and the schools. Such involvement, however, does not constitute exces-

sive entanglement violative of the First Amendment. As the United States Supreme Court has noted, it has never been thought either possible or desirable to enforce a regime of total separation between church and state; thus, the high wall of separation in modern interpretation has become "a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon v. Kurtzman*, 403 U.S. 602, 614, 91 S.Ct. 2105, 2112, 29 L.Ed.2d 745, 756 (1971).

[7, 8] It is clear from decisions of the Supreme Court that programs which require constant state surveillance or supervision to police the provisions of state programs or that single out church-related schools for preferential treatment will not be tolerated. *Wolman v. Walter*, 433 U.S. 229, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977); *Tilton v. Richardson*, 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971); *Walz v. Tax Commission*, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970); *Everson v. Board of Education*, 330 U.S. 1, 67 S. Ct. 504, 91 L.Ed. 711 (1947). Any entanglement between church and state in the present case does not reach the level of that which was struck down in *Lemon v. Kurtzman*, supra. In that case, state statutes provided state reimbursement to non-public elementary and secondary schools for the costs of teachers' salaries, textbooks and instructional materials. Under one statute, participating schools were required to identify the cost of secular educational service by prescribed accounting procedures that were subject to state audit. The other statute provided annual salary supplements to teachers of secular subjects in non-public elementary schools. The teachers were required to sign a written statement

agreeing not to teach religious courses while receiving salary supplements, and were required to teach only subjects taught in public schools, using the same materials. Such statutes were found to create excessive entanglement because comprehensive and continuing state surveillance would be required to insure that the programs' provisions were obeyed. In the present case, respondents contend that because different benefits accrue to those employees that are laid off and those that are fired, the state will necessarily become involved in questions of doctrinal interpretation. Such is not the case. The teachers in respondents' schools are not under contract; rather, they receive a "call" from the church and there are only two ways that a teacher may be released from that call. One is by teaching false doctrine and the other is by misconduct as outlined by respondents' own standards. In both cases, the rules relating to dismissal are regulated by internal doctrinal matters controlled by the church. The state, therefore, need only determine whether the employee was fired or laid off. The employee, as before, will be left to the mercy of repondents' personnel practices.

Respondents also rely on *National Labor Relations Board v. Catholic Bishop of Chicago*, 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979). The issue in that case was whether an NLRB attempt to exercise jurisdiction over diocesan schools to determine whether a particular personnel practice constituted an unfair labor practice fostered excessive entanglement between church and state. The Seventh Circuit United States Court of Appeals held in the affirmative. The Supreme Court stated that the resolution of such a question "in many instances,

[would] necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission" and thus create excessive entanglement. 99 S.Ct. at 1320. While noting the risks of entanglement inherent in such a relationship, however, the Court declined to decide the First Amendment question in the absence of a clear expression of an affirmative intention of Congress to bring teachers and employees in church-related schools within NLRB jurisdiction. The majority's extended discussion of the entanglement question nonetheless suggests that had such congressional intent been found to exist, serious issues of constitutional magnitude would arise. The minimal entanglement that might result in the present case, however, does not approach the potential effect, noted in *Catholic Bishop*, of mandatory collective bargaining on the ability of clerical authorities to administer their schools. In no case would the state be required to actually adjudicate employer/employee disputes in a sectarian school setting. Unemployment insurance coverage does not necessitate state involvement in the development of curriculum, faculty standards, working conditions or any other aspect of school operations. The unemployment insurance system would generally come into play only after an employee had been terminated and was no longer connected in any way with the particular school. Further, the financial impact of the unemployment insurance compensation law cannot be compared with the financial ramifications of NLRB jurisdiction over diocesan schools. In the case of the NLRB, there exists power to order reinstatement with back pay and to utilize judicial authority to enforce its ruling. The state had no such power in the present case. We also

note that the simple determination of the amount of time spent by employees working in respondents' schools, as opposed to its churches, does not foster entanglement of constitutional dimensions.

IV

[9] Finally, respondents contend that female teachers are exempt from coverage as members of a religious order under SDCL 61-1-10.4(2). Respondents argue that such teachers cannot be denied exempt status, because the Synod dogmatically considers its female teachers to be part of its Christian ministry. The fact, however, is that female teachers in respondents' schools are not permitted to perform any sacerdotal duties or to vote on Synod matters; rather, they are allowed to perform only those functions normally associated with basic education. Thus, their coverage under the unemployment compensation law is appropriate.

The judgment of the circuit court is reversed and the case is remanded with directions to reinstate the decision of the Appeals Referee.

WOLLMAN, C. J., and DUNN and MORGAN, JJ., concur.

HENDERSON, J., dissents.

HENDERSON, Justice (dissenting).

I respectfully dissent.

The object and purpose of the Wisconsin Evangelical Lutheran Synod, as set forth in its constitution, is to "extend and conserve the true doctrine and practice of the Evangelical Lutheran Church." One method of achieving this is by "establishing and maintaining theo-

logical seminaries, colleges, academies, schools, and other institutions." The Synod believes a theological basis exists for its schools. It holds the conviction that training of the youth involves both education and religion and the two are so closely interwoven that they cannot be separated. They operate school programs in accordance with their beliefs.

The Synod has 1105 churches of which 330 operate elementary Christian day schools. St. Martin's Evangelical Lutheran School, appellee, is one of these 330 elementary schools. The Synod also maintains two types of secondary schools: (1) Area high schools, designed to provide a Christian education to students at this level, and (2) Academies, structured to provide secondary education for individuals planning to enter the preaching or teaching ministry of the Church. Northwestern Lutheran Academy, appellee, is one of four such academies maintained by the Synod. The Synod has both teaching and preaching ministers. These ministers and teachers receive similar religious training; both receive, they sincerely believe, a divine, life-long call to serve their church and God. The Synod considers the female teachers to be a part of the ministry and they have responsibilities equal to that of the male teachers. Courses offered at the school and at the academy are taught from a religious viewpoint based upon scriptural convictions held by members of the Wisconsin Evangelical Lutheran Synod. The school is financed 100% by the local congregation. The Synod owns, operates, and finances the academy.

Both the school and the academy are exempt from income taxation under Section 501(c)(3) of the Internal

Revenue Code. In the past, they have also been exempted from Federal Unemployment Tax Act (FUTA) coverage by SCDL 61-1-10.4(3), which corresponds to 26 U.S.C. Section 3309(b)(3). SCDL 61-1-10.4, until recently, provided in pertinent part:

> 61-1-10.4 EXEMPT EMPLOYMENT BY CHURCHES, INSTITUTIONS AND STATES.—[f]or the purposes of Sections 61-1-10.2 and 61-1-10.3 the term "employment" does not apply to service performed:
>
> (1) In the employ of
>
> (a) a church or convention or association of churches, or
>
> (b) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, *or primarily supported by a church or convention or association of churches* (emphasis supplied); or
>
> (2) By a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or
>
> (3) In the employ of a school other than a state school which is not an institution of higher education prior to January 1, 1978.

The Unemployment Compensation Amendments Act of 1975, P.L. 94-566, 90 Stat. 2667, removed the subsection (3) exemption. Memoranda were thereupon sent to state employment security agencies by the U.S. Department of Labor, directing that all "church-related nonprofit elementary and secondary schools" be required to participate in the program. I am not bound by the interpretation of a bureaucrat in a government agency in Washington, D.C.

At a hearing conducted by the Field Service of the South Dakota Department of Labor, Unemployment Insurance Division, it was held that both schools were employers subject to S.D. unemployment insurance laws. Neither am I bound by a state employee's interpretation of congressional action. That determination was appealed and a hearing was held on July 19, 1978, before a Labor Department appeals referee. In his decision, entered September 15, 1978, the referee affirmed the initial determination that the schools were employers subject to coverage. To put it another way, each echelon of bureaucracy within the Department of Labor upheld itself. The circuit court, on appeal, reversed the referee upon the basis that the decision was affected by error of law in a misapplication of law and clearly erroneous in light of the entire evidence in the record. I would affirm the circuit court.

Counsel for appellees contend that they are exempt under SDCL 61-1-10.4 because of their relationship to a church. The state maintains that the repeal of the subsection (3) exemption for non-public schools was aimed at church schools as well as secular schools. The appeals referee concluded that a "church" as used in the statute, was synonymous with a "house of worship" rather than an organization of worshippers. This interpretation is most untenable when noting the context in which "church" is used. SDCL 61-1-10.4(1)(a) speaks of services performed in the employ of a church. If the term "church" in isolation is ambiguous, the context of this statute absolutely forecloses equation with a physical plant. Clear error was committed when the appeals referee defined the term in such a manner as to make the statute absurd and ineffectual under any circumstance.

When subsection (3), relating to private school coverage was repealed, Congress had a perfect opportunity to modify or remove the church-related exclusions. That was not done. The fact that the definition of church embodies an organization, rather than an edifice, strongly indicates that SDCL 61-1-10.4(1) exemptions remain valid and useful. In 1954, the question of defining the term "church" arose before the U.S. Senate. The Senate Finance Committee in its report observed:

> Your committee understands that 'church' to some denominations includes religious orders as well as other organizations which as integral parts of the church are engaged in carrying out the functions of the church *whether as separate corporations or otherwise. It is believed the term church should be all inclusive.* (Senate Report No. 1622, 83rd Congress, 2nd Session, page 30) (emphasis added)

In 1955, the staff of the Joint Conference Committee published its explanation of the Internal Revenue Code of 1954, entitled, "Summary of the Provisions of the Internal Revenue Code of 1954 (H.R. 8300) as Agreed to by the Conferees." On page 19 the staff explained:

> The term church is intended to include religious orders as well as other organizations which, as integral parts of the church, are engaged in carrying out the functions of the church, whether as separate corporations or otherwise.

With respect to FUTA, the legislative history gives no support whatever to a narrower definition of the term "church" other than being all inclusive and including integral parts of the church, such as the parochial school. Congress, when passing FUTA amendments, clearly understood its interpretation of the word "church."

The question thus becomes whether either or both of the schools fall within the subsection (1) exemptions. St. Martin's Evangelical Church School is not a separate entity of St. Martin's Evangelical Church. Appellants are attempting to cleave the school from the church and this cannot be done. The appeals referee found that while the school was state certified the school was supervised by a board of education elected from and by the local congregation. South Dakota requires accreditation of any school serving children under the age of sixteen in lieu of attending public schools. Inasmuch as religious schools must be state certified, this state requirement should not be the basis for labeling them strictly educational. Finance and supervision provide the critical nexus between church and school, which places the latter squarely within the SDCL 61-1-10.4(1)(b) exemption for services performed in the employ of an organization. The school is operated primarily for religious purposes and is operated, supervised, controlled or principally supported by the church. This is the heart of my dissent. The congregation of St. Martin's Church supports public schools, located within a reasonable proximity, through the payment of taxes; the only rational reason that it would bear the additional burden of operating and financing a private school would be for religious purposes. A clear error in concluding that the primary purpose of the school was not religious.

Northwestern Lutheran Academy's teaching faculty comes 50% from the teaching ministry and 50% from the preaching ministry. Of the students at the academy, 46% go on to become teachers or pastors. The academy's remaining 54% nevertheless receive courses of instruc-

tion with religious overtones. Again, it must be recognized that public secondary schools exist in reasonable proximity and are supported by taxes paid by members of the Synod. It is obvious that these members send their children to a school which embraces their religious beliefs and where their children will be taught Christian values. The academy exists only for church purposes. The fact that the state imposes state certification does not change the character of the academy which is to propagate the faith of the Synod, and it is manifestly wrong for a state agency to subordinate that mission.

Any attempt to subject appellees, who are religious organizations operating religious schools, to an unemployment compensation law would be an impermissible entanglement between the church and state contrary to the First Amendment to the Constitution of the United States and Article VI, Section 3 of the South Dakota Constitution which provides for freedom of religion. The First Amendment provides in part: "Congress shall make no law respecting an establishment of religion, or prohibiting of establishment of religion, or prohibiting the free exercise thereof . . ."

Under the unemployment compensation law, an employee who is laid off from work is entitled to unemployment compensation benefits, but an employee discharged for misconduct may be denied benefits. The majority opinion alludes to the fact that the only two ways a teacher may be released for cause is by teaching false doctrine and by misconduct as outlined by the appellee's own standards. It concludes that since rules relating to dismissal are regulated by internal doctrinal standards controlled by the church, there would only be

minimal entanglement because the state has only to determine whether the employee was fired or laid off. This matter of potential entanglement cannot be so cursorily treated. Let us hypothesize that the Synod discharged an employee citing the reason as teaching contrary to school doctrine or misconduct, but the employee contends that the real reason for the discharge was due to budgetary concerns, and therefore, he or she was merely laid off. This employee could request a hearing to determine if he or she was entitled to full benefits. Granted, while the entanglement would not reach the proportions as that found in *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979), such a hearing would nonetheless involve the question of whether the teacher did or did not teach contrary to Synod doctrine or on what basis, according to doctrinal standards, the employee's action constituted misconduct. The hearing examiner would have to rule on these matters of religious belief and misconduct, which is the kind of entanglement prohibited by the First Amendment to the Constitution.

The power to tax, surveil, and supervise this program is the power to destroy parochial schools. This program is another insidious spoke in the web of entanglement which chokes the free spirit of religious schools and their ability to function in their dedication to God. If religious schools are mandated into state and federal programs which exact money from them at governmental statutory whim, they shall die. They cannot coexist with governmental interference and over-lay. Our forefathers fled to these shores that they might worship as they please and to raise their children in their own reli-

gious faith. I do not believe in a system of government, congressional acts, state statutes, or legal interpretations by the judiciary that would destroy that dream. The Constitution is a bulwark against state invasion of religiously based schools. In it, I abide.

I do not believe that Congress intended the tax to be applicable to the services of church operations run directly by the church with its own employees. For a persuasive case in point, with the same basic issues and statutes and a result contrary to the majority opinion, see *The Lutheran Church, Missouri Synod, et al. v. State of California Employment Development Department, et al.*, (Case No. CV79-0162-MRP before the United States District Court, Division of California, Opinion rendered September 21, 1979).

Appendix H
Civ. No. 9719
Supreme Court of North Dakota

GRACE LUTHERAN CHURCH, A CORPORATION (GRACE LUTHERAN SCHOOL),
Petitioner and Appellee,
VERSUS
NORTH DAKOTA EMPLOYMENT SECURITY BUREAU AND NORTH DAKOTA UNEMPLOYMENT COMPENSATION DIVISION,
Respondents and Appellants.

June 20, 1980

PEDERSON, Justice.

This is an appeal by the Unemployment Compensation Division of the North Dakota Employment Security Bureau[1] from the decision of the district court that Grace Lutheran School, a division of Grace Lutheran Church, is not subject to the provisions of the North Dakota Unemployment Compensation Law. We affirm the judgment of the district court (§28-32-21, NDCC) and reverse the determination of the North Dakota Employment Security Bureau (§28-32-19, NDCC).

This case stems from changes made in the federal and state unemployment compensation laws. Briefly, an exemption for employees of elementary and secondary

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[1] See Ch. 522, S.L. 1979, Job Service North Dakota.

schools was repealed and a directive from the Secretary of Labor was issued that the new coverage included employees of *church*-related schools. Grace Lutheran School was notified that it was subject to the unemployment compensation tax. Because this case revolves around several sections of the Unemployment Compensation Laws, a brief overview of unemployment compensation legislation follows.[2]

Unemployment compensation had its beginning in the depression of the 1930's with its concurrent high levels of unemployment. Congress enacted the Social Security Act of 1935 to encourage states to adopt unemployment compensation statutes to alleviate some of the hardships caused by the depression. Title IX of the Act levied an unemployment wage tax on "for profit" employers with eight or more employees,[3] but allowed covered employers a credit against this federal tax liability for up to 90% of the employer's contributions to certified state unemployment funds.[4] All states enacted unemployment legislation by 1937. In order to meet the requirements for federal certification, state enactments were, what has been called, "mirror images" of the federal legislation. Four years after the passage of the So-

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[2] For a more detailed discussion of the history of unemployment compensation legislation see Davis, "Bringing Christian Schools Within the Scope of the Unemployment Compensation Laws: Statutory and Free Exercise Issues", 25 Villanova L. Rev. 69, No. 1 (1979-80).

[3] Social Security Act of 1935, Pub. L. No. 271, Title IX, § 907(a) and (c), 49 Stat. 642-43 (1935).

[4] Only payments made into *certified* state funds entitle the payor to a reduction of this FUTA liability. 26 U.S.C. § 3304(a) and (c).

cial Security Act, Title IX was reenacted as the Federal Unemployment Tax Act (FUTA).

From the mid-1950's to the present, a steady expansion of unemployment compensation coverage has occurred.[5] For purposes of this case, the more significant expansion started in 1970 when the states were required to extend coverage to employees of non-profit organizations.[6] However, §3309(b) of FUTA continued to permit the states to exclude from coverage, services performed:

"(1) in the employ of

(A) a church or convention or association of churches, or

(B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;

(2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;

(3) in the employ of a school which is not an institution of higher education."

In 1976, Congress amended §3309 by deleting sub-

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[5] For example, in 1954 Congress extended coverage to employers with *four* or more employees and enacted an unemployment compensation program for federal employees. See Pub. L. No. 767, 68 Stat. 1130.

[6] 26 U.S.C. § 3304(a)(6). See Employment Security Amendments Act, Pub. L. No. 91-373, 84 Stat. 695. Pursuant to 26 U.S.C.A. §§ 3301 and 3306(c) (1976), non-profit organizations are exempt from paying *federal* unemployment insurance tax even though the federal government requires the states' programs to cover such organizations.

section (b)(3), thus eliminating FUTA's general exclusion for elementary and secondary schools. In response to this amendment, the North Dakota Legislature made a number of changes to conform the state unemployment law to the federal law. Subsection (3) of §52-01-01(13)(h), NDCC, the "mirror image" of subsection (3) above, was deleted.[7] Section 52-01-01(13)(h)(1) and (2) remains unchanged and remains identical to the federal statute §3309(b)(1) and (2) quoted above.

It was not until 1978 that the United States Secretary of Labor issued an opinion letter[8] officially stating for the first time that *church*-related elementary and secondary schools were covered by FUTA.[9] In response to this opinion letter, a directive was issued to all state employment agencies requiring the state agencies to assess unemployment compensation taxes against church schools.

On April 14, 1978, Grace Lutheran School, a church school owned and operated by Grace Lutheran Church, was notified that it was subject to coverage under the North Dakota Unemployment Compensation Law and that it had the option to pay the unemployment tax on a percentage basis or on a reimbursement basis. Grace Lutheran School objected on the ground that its teachers

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[7] Ch. 459, § 4, S.L. 1977.

[8] See *Independent Baptist Church, Etc. v. State of Tenn.*, 468 F. Supp. 71, 74 (E.D. Tenn. 1978), for a summary of the text of the Secretary of Labor's opinion letter.

[9] It is interesting to note that an administrative law judge, in a memorandum to the Secretary of Labor, noted that immediately after the 1976 amendments to FUTA were passed the Labor Department issued two non-public memoranda to the states indicating that church-school employees were still *excluded* from FUTA under § 3309(b)(1). See footnote 121, 25 Villanova L. Rev. 69 at 84.

were employees of Grace Lutheran Church. Even though this is conceded by the Bureau and should have been included in findings by the Bureau, Grace Lutheran School was nevertheless required to and did elect the reimbursement method, but appealed from the determination that it was covered. A hearing was conducted before the Unemployment Compensation's Chief Appeals Referee which resulted in a determination that Grace Lutheran School was subject to the North Dakota unemployment compensation law. This decision was appealed to the North Dakota Employment Security Bureau which affirmed the decision of the Unemployment Compensation Division.

Thereafter, Grace Lutheran Church filed a petition for judicial review of the Bureau's decision in Burleigh County District Court. On October 11, 1979, a judgment was rendered which reversed the Bureau's decision and held that the employees of Grace Lutheran School were not subject to the North Dakota Unemployment Compensation Law. The North Dakota Employment Security Bureau appealed this decision to the Supreme Court.

It is the Bureau's position that it was the intention of Congress (and the North Dakota Legislature) to cover employees of *all* elementary and secondary schools, including church-related schools, when §3309(b)(3) (and §52-01-01(13)(h)(3), NDCC) was deleted and that it is constitutionally permissible to extend unemployment compensation coverage to church-related schools.

It is Grace Lutheran Church's first contention that by deleting the subsection (3) exemption for elementary and secondary schools, public and private schools are

now covered, but that employees of Grace Lutheran School are still exempt under §3309(b)(1)(A) (and §52-01-01(13)(h)(1)(a), NDCC), which provides an exemption for service performed in the employ of "a church or convention or association of churches." The trial court agreed with this contention. Secondly, Grace Lutheran Church contends that if Congress or the North Dakota Legislature intended that church schools be covered, the statute is an unconstitutional infringement on the church's First Amendment rights.

[1] As a preliminary matter, we note that as this case involves an administrative agency, the Administrative Agencies Practice Act (Chapter 28-32, NDCC) applies. Section 28-32-01, NDCC, defines an administrative agency to include any bureau having statewide jurisdiction and authority to make a determination which has the force and effect of law and which by statute is subject to review by the courts. The organization of the Employment Security Bureau is set out in Title 52, NDCC. Section 52-04-17 provides that the Unemployment Compensation Division may make administrative determinations with respect to whether or not an employer is covered under the unemployment compensation laws, hence it has statewide jurisdiction and authority to make determinations having the force of law. Section 52-06-27 provides for judicial review of decisions of the Employment Security Bureau.

[2] The judicial review provisions of Chapter 28-32, NDCC, are not exclusive. Special statutes prevail if in conflict with the more general provisions of Chapter 28-32. *Evanson v. Wigen*, 221 N.W.2d 648 (N.D. 1974). However, in the instant case it appears that no such

conflict exists. Both § 52-06-27 and § 28-32-15 provide that an appeal is to be taken within 30 days after notice of the decision of the agency. Section 28-32-19 deals with the court's scope of review on appeal. In cases where the facts are not in issue,[10] the court is to affirm the decision of the agency unless it finds:

> "1. The decision or determination is not in accordance with the law.
>
> "2. The decision is in violation of the constitutional rights of the appellant."

Review by the supreme court is governed by this same standard. See § 28-32-21, NDCC.

Thus, the threshold questions on this appeal involve a determination of whether or not the agency's decision that church schools are covered by unemployment compensation legislation is in accordance with the law, and if so, whether or not that decision violates the constitutional rights of Grace Lutheran Church.

I. STATUTORY CONSTRUCTION

[3, 4] Generally, legislative intent must first be sought from the language of the statute. *Apple Creek Tp. v. City of Bismarck*, 271 N.W.2d 583 (N.D. 1978). "When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." Section 1-02-05, NDCC. Repeals by implication are not favored. *First American Bank & Trust Co. v. Ellwein*, 198 N.W.2d 84, 98 (1972).

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[10] It could be contended that there is a conflict as to the correct standard for a court to apply in cases involving fact questions. See § 52-06-27 and § 28-32-19(5).

In repealing the exemption for services performed "in the employ of a school which is not an institution of higher education," it is clear that public and private (non-church) elementary and secondary schools were covered by the unemployment compensation legislation. It is contended by the Bureau that *church*-operated elementary and secondary schools are covered. The issue is whether or not they are covered.

First of all, it is Grace Lutheran Church's contention that by leaving intact §3309(b)(1) when it repealed (b)(3), Congress intended that church-operated schools could still qualify for an exemption. Subsection (A) of §3309(b)(1) exempts all services performed in the employ of a church or an association of churches. It is arguable that a school such as Grace Lutheran School that is not separately incorporated and whose teachers have employment contracts directly with the church would qualify for an exemption under this subsection.[11]

[5] Secondly, Congress, in deleting §3309(b)(3) expressed no *specific* intent to require states to tax Chris-

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[11] A church school whose teachers are not employed directly with the church school may still qualify for an exemption under Subsection (B) of §3309(b)(1). This section exempts services performed in the employ of an organization which is (1) operated primarily for religious purposes, and (2) operated, controlled, or principally supported by a church or convention or association of churches. As to the first requirement, the supreme court has characterized church schools as being operated primarily for religious purposes. *NLRB v. Catholic Bishop of Chicago, supra; Meek v. Pittenger*, 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975); *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). As to the second requirement, it would be necessary for the church school to show that it is administered by church officials, supported by church funds, that the teachers are members of the parent church etc.,

tian schools. A recent Supreme Court decision states that in the absence of clear expression of affirmative Congressional intent, an administrative agency may not assert jurisdiction over an organization if doing so may tend to jeopardize the religious freedoms of the organization. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 99 S. Ct. 1313, 59 L.Ed.2d 533 (1979). See also *Owen v. City of Independence*, ____ U.S. ____, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980).[12]

Therefore, since Congress made no specific, express reference to church schools when deleting §3309(b)(3), and since a persuasive argument can be made that church schools, such as Grace Lutheran, are excluded under § 3309(b)(1), the required "clear expression of an affirmative intention of Congress" that church schools should pay unemployment compensation tax appears to be lacking.[13]

[6] Applying the same rules of construction in considering the repeal of §52-01-01(13)(h)(3), NDCC, we reach the same conclusion. Without pointing out any ambiguity in the applicable statutes, the Bureau urges us to seek the intent of the Legislature from extrinsic aids. It points out that before the passage of Senate Bill 2213 [S.L. 1977, Ch. 459, §4, which repealed §52-01-

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[12] In cases where a tradition is rooted in the common law and is supported by strong policy reasons, "Congress would have specifically so provided had it meant to abolish the doctrine." *Owen v. City of Independence, supra.*

[13] Although several lower courts in other states have reached the same conclusion (see cases cited at footnote 116 of 25 Villanova L.Rev. 69 at 84), the South Dakota Supreme Court, in the case of *Matter of Northwestern Lutheran Academy*, 290 N.W.2d 845 (S.D. 1980), reached the contrary conclusion.

01(13)(h)(3)] in a Senate committee hearing on Industry, Business and Labor, the committee members were advised that the bill would provide "protection for all state, and local governmental employees, *elementary and secondary school employees* and employees of municipalities and *parochial schools.*" [Emphasis added.] Minutes of January 24, 1977, Testimony Senate Industry, Business and Labor Committee of North Dakota Legislature. Testimony from a House Committee hearing was similar: "Mary College is now covered and the *parochial schools will be covered.*" [Emphasis added.] Minutes of February 23, 1977, Testimony House Industry, Business and Labor Committee of North Dakota Legislature.

[7] Even though the North Dakota Legislature was informed that church schools would be covered by unemployment compensation with the repeal of § 52-01-01(13)(h)(3), we conclude that the result was not accomplished. The clear and unambiguous language of § 52-01-01(13)(h)(1)(a) provides an exemption for service performed in the employ of "a church or convention or association of churches." The removal of § 52-01-01(13)(h)(3) did not ipso facto remove the other exemption. Furthermore, it is a long-established rule of law that if a statute is susceptible of two meanings, and one of those two meanings would make the statute invalid, the one which makes it valid prevails. See 2A Sands, Sutherland Statutory Construction (4th ed. 1972), §45.11, at 33; *State v. Julson,* 202 N.W.2d 145 (N.D. 1972); *Wallentinson v. Williams County,* 101 N.W.2d 571 (N.D. 1960); and *Marks v. City of Mandan,* 70 N.D. 434, 296 N.W. 34 (1940); all cited in *Kottsick v. Carlson,* 241 N.W.2d 842 (N.D. 1976).

II. CONSTITUTIONAL QUESTIONS

[8] Only if we were to accept the contentions of the Bureau that church schools in North Dakota are covered by unemployment compensation as a result of the repeal of §52-01-01(13)(h)(3), could we look to see if requiring coverage violates the constitutional rights of Grace Lutheran Church. If it is possible to do so, this court avoids interpretations of statutes which place the statute in disharmony with the Constitution. *North American Coal Corp. v. Huber*, 268 N.W.2d 593 (N.D. 1978). Occasionally, however, because of public interest, we express views on issues when judicial economy indicates that issues which have been thoroughly briefed and argued should be disposed of. See, generally, *Saetz v. Heiser*, 240 N.W.2d 67, 70 (N.D. 1976). Accordingly, we will discuss the constitutional disharmony that would result from our sustaining the interpretation urged by the Bureau.

The First Amendment[14] of the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." Thus, it prohibits the government from making laws which either (1) foster the establishment of a religion or (2) prohibit the free exercise thereof. Both the establishment clause and the free exercise clause apply to the states under the Fourteenth Amendment. *Everson v. Board of Education*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711, 168 A.L.R. 1392 (1946).

[9] Although the scope of the establishment clause of the First Amendment is not precisely drawn, we know

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[14] See also Section 4, Constitution of North Dakota.

that it does more than forbid a state church, and that it does less than forbid every action by the government that affords a benefit to a religion. *Zorach v. Clauson*, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1952). In *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), the court described the scope and main concerns of the establishment clause as follows:

> "Its author did not simply prohibit the establishment of a state church or a state religion . . . Instead they commanded that there should be 'no law *respecting* an establishment of religion.' A law may be one 'respecting' the forbidden objective while falling short of its total realization. . . .
>
> "In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' *Walz v. Tax Commission*, 397 U.S. 664, 668, 90 S.Ct. 1409, 1411, 25 L.Ed.2d 697, 701 (1970)." 403 U.S. at 612, 91 S.Ct. at 2111.

This last aspect—concern over active governmental involvement—was further defined in *Walz, supra*, as follows:

> "Determining that the legislative purpose . . . is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result—the effect—is not an excessive government entanglement with religion." 397 U.S. at 674, 90 S.Ct. at 1414.

[10] To analyze whether or not a statute violates the establishment clause three tests must be applied. *Lemon v. Kurtzman, supra.*

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, 392 U.S. 236, 243, 88 S.Ct. 1923, 1926, 20 L.Ed.2d 1060, 1065 (1968); finally the statute must not foster 'an excessive governmental entanglement with religion.' *Walz, supra*, at 674, 90 S.Ct. at 1414, 25 L.Ed.2d at 704." 403 U.S. at 612-613, 91 S.Ct. at 2111.

If an affirmative response is possible for all three tests, the statute does not violate the clause.

The first two tests present no problem in the instant case. Extending unemployment compensation to elementary and secondary schools has a secular purpose, i.e., to avoid hardships for people temporarily without employment, and affords no basis for concluding that the legislative intent was to advance or inhibit religion. It is the last area—avoiding excessive governmental entanglement with religion—which is in issue here.

The Supreme Court has held that programs which require constant state surveillance or supervision to police them will not be tolerated. *Wolman v. Walter*, 433 U.S. 229, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977); *Tilton v. Richardson*, 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971); *Lemon v. Kurtzman, supra; Walz v. Tax commissioner, supra; Everson v. Board of Education, supra.* In *Lemon*, a case involving grants to parochial schools for salaries of teachers of secular subjects, statutes providing for the grants were held to violate the establishment clause as fostering excessive entanglement in view, inter alia, of (1) the religious purpose and operation of church-related elementary and secondary schools, (2) the necessity of state surveillance to insure

that teachers, who are subject to control by the religious organization, observed the restrictions as to purely secular education, and (3) the necessity of the state's examination of the parochial school's financial records to determine which expenditures were religious and which were secular.

[11] These same problems appear when applying unemployment compensation legislation to Grace Lutheran Church. First of all, the church school has a religious purpose, i.e., to educate its youth in accordance with the "confessional standards" of the congregation.

Secondly, it will require extensive state surveillance to enforce the program. For example, in the directive that was issued to all state employment agencies, the states were advised that if an employee performs both non-exempt and exempt services during a single employment period, and more than one-half of the services were exempt "then none of the services of such employee for such period shall be deemed to be employment." In other words, if employment records for any period show that an employee was engaged in religious training services more than secular training services, that employee would not be covered under the unemployment compensation law. Thus, in the case of a teacher who is employed by a church school (non-exempt) and who also performs religious duties for the church (exempt), the state agency will have to conduct extensive audits in order to determine whether or not the employee has spent more than one-half of his time on purely religious activity. This kind of state inspection and inquiry will also require extensive records, and "entails a pervasive monitoring of these church agencies by the secular au-

thorities." *Lemon v. Kurtzman, supra*, 403 U.S. at 627, 91 S.Ct. at 2118 (Douglas, J., concurring).

An equally disturbing problem arises where an employee seeks benefits, as the agency will have to determine whether or not the decision of the church school to fire or lay off the employee was justified under the "good cause" standard. The teachers employed by Grace Lutheran Church are hired partially on the basis of religious and moral qualifications and are required by contract to teach in accordance with the "confessional standards" of the Lutheran Church. Thus, disputes may arise where the church dismisses an employee for failure to teach according to the religious tenets of the church. The employee may contend that the real reason he or she was dismissed was due to budgetary concerns. In such event, the state agency would have to determine whether or not the teacher did, in fact, fail to adhere to the religious tenets of the church. This is the type of entanglement prohibited by the First Amendment to the Constitution.

These factors support the conclusion that the end result of including church schools in unemployment compensation legislation raises serious questions as to excessive governmental entanglement with religion. Accordingly, we avoid the interpretation which creates such disharmony.

The judgment of the district court is affirmed and the determination of the North Dakota Employment Security Bureau is reversed.

ERICKSTAD, C. J., and PAULSON, SAND and VANDE WALLE, JJ., concur.

Appendix I

Nos. 79-3968, 79-4032

United States Court of Appeals,
Fifth Circuit

STATE OF ALABAMA,

Petitioner,

VERSUS

F. RAY MARSHALL, SECRETARY OF LABOR,

Respondent.

STATE OF NEVADA,

Petitioner,

VERSUS

F. RAY MARSHALL, SECRETARY OF LABOR,

Respondent.

Sept. 8, 1980

Before COLEMAN, Chief Judge, RONEY and GARZA, Circuit Judges.

GARZA, Circuit Judge:

The question presented for our determination is whether the Unemployment Compensation Amendments of 1976[1] discontinued the Federal Unemployment Tax Act (FUTA)[2] exemption for employees of elementary and secondary church schools. For an understand-

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[1] Pub.L. No. 94-566, 90 Stat. 2667.

[2] 26 U.S.C. § 3301 et seq.

ing of the present controversy a brief review of the relevant FUTA exemptions is in order.

Prior to 1970, FUTA did not require states' unemployment compensation programs to include nonprofit organizations, such as hospitals and schools, within their unemployment compensation coverage. The Employment Security Amendments of 1970[3] required states' programs to include these organizations within their coverage, but the amendments provided two express exemptions of importance to this case. 26 U.S.C. § 3309(b)(1) provided an exemption for service performed:

> (1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches.

Section 3309(b)(3) provided an exemption for service performed "in the employ of a school which is not an institution of higher education."

In 1976, Congress deleted the exemption contained in § 3309(b)(3) thereby requiring coverage of elementary and secondary schools. Following the 1976 amendments, Petitioners, Alabama and Nevada, modified their compensation laws to delete the corresponding exemptions within their program coverage.[4] After over a year of equivocation, the Secretary of Labor took the official position that the deletion of § 3309(b)(3) required coverage of services performed in all elementary and second-

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[3] Pub.L. No. 91-373, 84 Stat. 695.

[4] Ala.Code § 25-4-10(b)(21); Nev.Rev.Stat. § 612.121 (1977).

ary schools, including church schools. The Secretary's position was and remains that § 3309(b)(1)(B) has no application to church schools and that § 3309(b)(1)(A) applies only to "those strictly church duties performed by church employees at the school pursuant to their church responsibilities."[5] Alabama and Nevada refused to follow the Secretary's interpretation of the law[6] and the Secretary instituted administrative proceedings to withhold certification of Petitioners' compensation programs. After an evidentiary hearing the Administrative Law Judge determined that the Secretary's position was erroneous and recommended that the Petitioner's programs be certified.[7] Feeling that the term "church" should be narrowly defined to include only the physical house of worship, the Secretary rejected the recommendation of the Administrative Law Judge on October 31, 1979 and the Petitioners now seek review of the Secretary's ruling.

The Petitioners contend that sectarian elementary and secondary schools remain exempt under the "plain language" of § 3309(b)(1)(A) because the services performed by employees of these schools are performed in

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[5] Unemployment Insurance Program Letter No. 39-78 (May 30, 1978).

[6] The Alabama Department of Industrial Relations refused to comply with the Department of Labor's directive after having been enjoined to do so as a consequence of litigation of this issue in the state courts.

[7] The Administrative Law Judge relied upon both § 3309 (b)(1)(A) and (B) and based his recommendation for certification on several reasons: the "plain language" of the statute; the Congressional intent and history; and the probability of state-church "entanglement". We express no opinion on the various holdings of the Administrative Law Judge, but rest our opinion solely on the "plain language" of § 3309(b)(1)(A).

the "employ of a church." In support of their argument that church schools are within the statute's meaning of "church", the Petitioners point to the uncontradicted evidence in the administrative record showing that: many of the church schools have no separate legal existence from their church; the school employees are hired, controlled, disciplined, and fired by church representatives and officials; school buildings are owned by the church; and school employees are paid with funds drawn from the church accounts. To support their argument that employees of church schools are in fact employees of the church, the Petitioners point to 26 U.S.C. § 3306(a)(1) which defines "employer" and "any person who . . . paid wages." Additionally, 26 C.F.R. § 31.3121(d)-1(c)(2) (1979) explains that an employer-employee relationship exists when the employer has a right to control the manner in which services are performed, has the right to discharge the person performing the services, and furnishes the place to work. Lastly, the Petitioners cite many cases which recognize that services performed by parochial schools are an "integral part" of the religious mission of the governing church. *NLRB v. Catholic Bishop*, 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979); *Meek v. Pittenger*, 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 201 (1975); *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

[1, 2] Although both sides of this case point to evidence of Congressional intent favoring their positions, the law is well settled that a statute must be interpreted according to its plain language unless a clear contrary legislative intention is shown. See *NLRB v. Catholic Bishop*, supra; *U.S. v. Apfelbaum*, ____ U.S. ____,

100 S.Ct. 948, 63 L.Ed.2d 250 (1980). Regarding § 3309(b)(1)(A), we can find no clear Congressional intention to desire a result contrary to its plain language. The statute plainly indicates that the exemption is contingent upon who the employer is and is not contingent upon the type of services the employee is performing. There is no question here that the persons performing services in these religious schools fall within the "in the employ of" language of the statute, therefore, if the employees involved are employed by a "church", the exemption applies to them. Resolution of this question depends upon what is meant by "church" as used in the statute. We are convinced that the plain meaning of "church" requires a definition as something qualitatively greater than the physical building of worship and, at a minimum, the term encompasses the legal entity commonly referred to as a church. The Secretary would avoid the legal consequences of this definition by excluding the very people which comprise a church as an entity and perform its functions. For this court to adopt such a limited definition would be for us to ignore the historic function of churches and defy the definition of the word as used in our vocabulary.

If Congress desires to change the established exemption of unemployment compensation coverage for elementary and secondary parochial school employees, it is well within its ability to amend the law to reflect that desire by drafting a clear statement to that effect. But, it is not the responsibility or function of this court to perform linguistic gymnastics in order to upset the plain language of Congress as it exists today.

Petition for Review is GRANTED and the Decision of the Secretary of Labor is hereby SET ASIDE.

Appendix J
U.S. Department of Labor
Office of Administrative Law Judges
Conformity Proceeding

UNITED STATES DPARTMENT OF LABOR
VERSUS
STATE OF ALABAMA DEPARTMENT OF INDUSTRIAL RELATIONS AND STATE OF NEVADA EMPLOYMENT SECURITY DEPARTMENT[1]

Before: WILLIAM A. GERSHUNY
Administrative Law Judge

RECOMMENDED DECISION

This case arises out of the Secretary's interpretation of the 1976 amendment to Section 3309(b) of the Federal Unemployment Tax Act, 26 U.S.C. 3309(b) (hereafter "FUTA"), as requiring extension of unemployment compensation coverage by the states to employees of primary and secondary religious schools. Two states, Ala-

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[1]Proceedings against four additional states, Tennessee, Washington, Texas and Michigan, were postponed by agreement of the parties. The following were granted interested party status with rights to submit briefs and participate in oral argument:

Alabama Association of Christian Schools
Tedd N. Williams, Esquire
Gibbs & Craze
6929 W. 130th Street
Cleveland, OH 44130

Roman Catholic Dioceses of Nashville and Memphis
Dick Taylor, Esquire
300 James Robertson Parkway
Nashville, Tenn. 37201

bama and Nevada, construe the statutory provision as exempting such schools from coverage and have been determined by the Secretary to be in noncompliance with FUTA. At stake is their entitlement, under 42 U.S.C. 502-504, to millions of dollars annually through Department of Labor grants to pay for the costs of administering their unemployment laws. At issue is whether Congress intended, under Sec. 3309(b) of FUTA, to provide unemployment compensation benefits to employees of such schools and to fund the program on the basis of an excise tax imposed on the religious schools.[2]

United States Catholic Conference
George Reed, Esquire
Gerald C. Tobin, Esquire
1312 Massachusetts Ave. N.W.
Washington, D.C. 20005

General Conference of Seventh-day Adventists
Lee Boothby, Esquire
Suite 629
6930 Carroll Avenue
Washington, D.C. 20012

Martha Miles
Thomas G. Keith, Esquire
Legal Services
601 Terry-Hutchens Building
Huntsville, Ala. 35801

Lutheran Church-Missouri Synod
Philip E. Draheim, Esquire
17th Floor
515 Olive Street
St. Louis, Mo. 63101

[2]At least one state, California, will continue to receive grant monies for the reason that it is "out of compliance" due to a preliminary injunction issued on September 21, 1979 by the United States District Court for the Central District of California in *Grace Brethren Church et al., v. State of California et al.*, No. CV 79-93.

For the reasons expressed herein, I conclude that Congress did not so intend and, accordingly, I recommend that the States be certified by the Secretary as entitled to federal grants to pay for the costs of administering their unemployment laws.

I

Procedurally, this case was initiated by the Secretary's filing of a Notice of Hearing on August 10, 1979. The Commencement of this proceeding was preceded by the Secretary's formal notification to the States of their non-compliance by letter dated July 6, 1979 and their requests for a hearing on July 16 (Alabama) and 17 (Nevada). The Secretary's Notice scheduled the hearing for September 5, 1979 in Washington, D.C. and established rules of procedure which, *inter alia*, required the issuance of a recommended decision by not later than October 17, 1979 and otherwise forbade the administrative law judge from granting continuances which would prevent the issuance of the decision by that date. By Order dated August 10, 1979, a prehearing conference was scheduled for August 27, 1979 to consider stipulation of the record. In addition, pretrial discovery was preliminarily banned. Over the course of several weeks, under the direct supervision of the administrative law judge, the parties were able to stipulate virtually all the facts relating to the state laws and their impact on church schools and to the organization of Catholic, Baptist and Lutheran church schools and their academic programs. An evidentiary hearing was held on September 26, 1979, briefs submitted thereafter and oral argument heard on October 9, 1979. On September 25, one day prior to the hearing, the Secretary offered to

consent to a continuance of the hearing and to certify the states as in compliance in 1979, if the states would agree to such a continuance *prior* to the commencement of the administrative hearing. On the morning of the hearing, four states so agreed and the proceedings involving them were severed and continued generally. Alabama and Nevada's counterproposal to proceed with the hearing so as not to unduly inconvenience the large number of out-of-town counsel and then stay further proceedings was rejected by the Secretary.

Against this procedural backdrop, the states contend that they have been denied procedural due process in that their opportunity for an administrative hearing was grossly restricted by the Secretary's delay in commencing the proceeding and his requirement that a decision be rendered by the administrative law judge by October 17. Whatever the merits of this contention might be, it is clear that, under the Secretary's *ad hoc* rules of procedure, I lack authority to consider and decide the issue. Rule 4 requires issuance of the recommended decision by October 17 and, the record will reflect, there was no remaining time for discovery or other trial preparation. In any event, there is nothing in this record to reflect that either of the states was deprived of an opportunity to offer evidence which it considered vital to its case.

II

The Federal Unemployment Tax Act (FUTA) had its roots in the fertile fields of New Deal legislation of the 1930's. In its original version, 49 Stat. 620, FUTA imposed an excise tax on "for profit" employers with eight or more employees and, as an incentive for the enact-

ment of State unemployment compensation laws, allowed covered employers a credit against federal tax liability for up to 90% of contributions to a federally approved state program and provided for grants to states with qualifying programs to pay for costs of administration. As a consequence, all states enacted mirror images of FUTA.

Coverage was broadened in 1970 with enactment of the Employment Security Amendments Act, 84 Stat. 695, which imposed the tax on employers of one or more employees and redefined employer to include non-profit organizations. Included in the 1970 amendments was a new section 3309 to the Internal Revenue Code of 1954, which nevertheless continued the prior exemption of services performed

> (1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches;
>
> (2) by a duly ordained, commissioned or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;
>
> (3) in the employ of a school which is not an institution of higher education;

In 1974, to combat a severe economic downturn, Congress enacted a Special Unemployment Assistance Program (SUA), 83 Stat. 1845, which temporarily provided benefits, at the sole expense of the federal government, to employees of non-profit elementary and secondary schools, who were not covered under the regular

program. Because such non-profit schools were not subjected to any tax liability under the SUA program, there was no occasion to consider constitutional implications of the legislation.

However, the SUA program soon was replaced by the Unemployment Compensation Amendments of 1976, 90 Stat. 2667, which, in relevant part, deleted subsection (3) of Section 3309(b). Construing this amendment as evidence of a Congressional intent to provide permanent coverage to all employees of church elementary and secondary schools (except ministers and those performing strictly church duties in the schools) the Department initiated this proceeding to determine whether Alabama and Nevada, which otherwise construed the amendment, are maintaining a "conforming" unemployment compensation program and, thus, are eligible for massive federal grants.

III

Essentially all the facts relevant to the issues presented have been stipulated by the parties. Because no recommended findings need be made, the facts will be summarized only.

Alabama's initial efforts to provide coverage for employees of church related elementary and secondary schools were enjoined permanently on January 29, 1979, in *Trinity Evangelical Lutheran Church v. Department of Industrial Relations*, No. CV 78 500325, Cir. Court Mobile County, and preliminarily enjoined on January 22, 1979 in another suit filed by Baptist and Methodist churches. The State voluntarily dismissed its appeal of the former and thereafter ceased its efforts to compel church schools in Alabama to pay unemployment taxes.

Nevada came into "non-compliance" with its factual determination that Roman Catholic elementary and secondary schools, under the State equivalent of subsection (b)(1), were exempt because services in those schools were performed in the employ of the church or a church-controlled organization operated primarily for religious purposes. For purposes of this proceeding, the Department does not challenge the State's factual conclusions.

Roman Catholic elementary and secondary schools are operated and controlled by the Bishop of the Diocese, have no separate corporate existence, were founded for religious reasons and teach otherwise secular subjects with religious content. Principals are priests, subject to direct control of the appropriate parish priest. Student participation in religious exercises is an integral part of the curriculum. Operating funds are derived principally from church members. Only 3-5% of the lay teachers are non-Catholic. Teachers are employed by the principal and parish priest, are paid by the Diocese, teach subjects with religious content and perform religious duties, and are subject to discharge for not fulfilling the Church's religious mission.

Baptist churches are tax-exempt corporations whose members are fundamental Bible believers. Its day schools are considered as integral and functional parts of the church, occupy the same facilities as the church, are controlled and supported by the maintaining church. Superintendents are ordained ministers or graduates of religiously oriented colleges. Religious instruction is mandatory, "secular" subjects are taught in conformity with church doctrine, textbooks are published by reli-

gious institutions and operating funds are derived from the church budget. Teachers are either ordained ministers or other certified individuals, are hired by the superintendent and pastor, are subject to discharge for breach of religious doctrine and must be members of the church.

Lutheran elementary and secondary schools are controlled and operated by the church, which is a tax-exempt corporation. It selects the curriculum and hires and supervises the school staff. The curriculum is similar to that of secular schools. Operating funds are derived by the church and student tuition. Teachers are paid from church funds and school facilities, often located in the church building, are owned by the church. Teachers are subject to discharge for failure to teach church doctrine by word and personal example, both inside and outside the classroom. Religious instruction is required and all subjects are taught in conformity with church doctrine.

If such schools are covered under FUTA, they would be required to maintain employment records, to file periodic reports with the states and respond to individual claims for benefits; would be subject to periodic examination as to the amount of their contributions and administrative inquiries as to the nature and extent of covered services; and would be subject to civil and criminal enforcement procedures. The states would be required to determine whether a claimant was discharged for misconduct or voluntarily left his employment without good cause.

IV

The Department's position in this proceeding is

somewhat elusive. On the one hand, it asserts that Congressional deletion of the school exemption in subsection (3) "militates strongly in favor of construing the statute to cover *all* elementary and secondary schools, including those organized by the churches . . ." (Brief p. 11) and that the religious purposes exemption of subsection (1) "is not available as an exemption because coverage of elementary and secondary school activity was intended by Congress . . . [and] to conclude otherwise would be to carve out a special rule based upon religious motivation offending the Establishment Clause of the First Amendment to the Constitution" (Brief p. 22). On the other hand, it asserts that subsection (2) exempts ordained ministers and members of religious orders in the exercise of their religious duties in such schools and that the performance of church duties (as distinguished from school duties) by church employees at the schools pursuant to their church responsibilities likewise is exempt under 3309(b)(1). (Brief p. 2)

More specifically, it contends that the words "in the employ of a church" in subsection (b)(1) is intended to refer not to the employing entity, i.e. the religious organization, but rather to the function being performed by the employee, e.g. teaching. The word "church", it argues, refers to the house of worship and not the organization. Thus, for example, a lay employee of a religious organization teaching religious doctrine at an elementary school conducted by that organization in its house of worship would be covered under FUTA and the exemptive provisions of subsection (b)(1) would be inapplicable.

Its position as to the interpretation of 3309, it argues, raises no constitutional issues because coverage of

church schools under FUTA does not create excessive governmental entanglements with the church. In this connection, it contends that neither the program's recordkeeping and filing requirements nor its administrative inquiries as to elegibility for benefits would require the government "to become involved in such issues as resolving disputes as to church doctrine in order to resolve claims for benefits" (Brief p. 17).

Not only is the Department's position as to the meaning of section 3309(b) elusive, it has not remained constant. Shortly after enactment of the 1976 amendments, which in part deleted subsection (3) of section 3309(b), the Department formally advised the states that the effect of this change is to mandate coverage of elementary and secondary schools operated by the State and its political subdivisions or by nonprofit organizations" (ALJ Exh. 2, pp. 24-25). Coverage of church schools was not suggested. Thereafter, in a December, 1976 Department memorandum to the states, the following question and answer appeared:

> *Question:*
> Do the 1976 amendments affect church related schools?
>
> *Answer:*
> Yes, to the extent that coverage is extended to elementary and secondary schools. In other respects no changes were made, and the exclusion in sections 3309(b)(1), (2) . . . are still applicable. . . . For example, the coverage of nonprofit elementary and secondary schools does not affect the optional exclusion in 3309(b)(1).

(ALJ Exh. 3, p. 5). Having thus affirmed the applicability of the exemptive provisions of section 3309(b)(1) to

church schools, the Department went on, in a February, 1977, memorandum to the states, to explain the criteria for determining applicability of the provision:

> Thus, under section 3309(b)(1), FUTA, it must first be determined whether the workers in question are employed by a church or by an organization other than the church. If the workers are employed by a church, their services are excluded. Whether the church is the employer is primarily a question of fact. If, however, the workers are not employed by the church, it must then be determined whether the employing organization is operated primarily for religious purposes. If operated primarily for religious purposes, the services are excluded only if the employing organization is operated, supervised, controlled or principally supported by the church.
>
> The determination of whether the exclusion applies can be made only after a thorough analysis of the legal interests and relationships between the organization and the church.
>
> The changes made in section 3309 by P.L. 94-566 do not change the application of the exclusions in section 3309(b)(1)(A) and (B).

(ALJ Exh. 4, pp 6-7). Significant is the Department's interpretation of the words "in the employ of a church" as meaning the "employing organization" and not, as presently contended, the physical structure where religious functions are performed.

By April, 1978, the Department tacitly rejected its earlier contemporaneous construction of the 1976 amendments and formally adopted the position asserted in these proceedings (DOL Exh. 1). By memoranda dated May 30, 1978 (DOL Exh. 2) and November 13, 1978 (ALJ Exh. 7), the Department advised the states

that church related elementary and secondary schools were covered and the exemptive provisions of subsection (b)(1)(A) and (B) have no application to church activities performed in church related elementary and secondary schools "since schools are not churches within the meaning of that section" (DOL Exh. 2, p. 2).

The position of Alabama and Nevada, supported by a number of religious organizations, is that church schools, being an integral part of the governing church and fundamentally religious in character, are exempt from coverage under the plain language of section 3309(b) (1)(A) and/or (B). Moreover, they contend that, while the legislative history does not specifically address the status of church schools under section 3309(b)(1), it "plainly indicates" a Congressional intent to exempt all services where the church is the employing entity. And, finally, the States argue that the Department's construction of section 3309(b) is impermissible for the reason that it would render the legislation violative of the First and Fourteenth Amendments to the Constitution under the excessive entanglement doctrine established by the Supreme Court.

V

There is no lack of precedent as to the application of Section 3309(b)(1) to church elementary and secondary schools. In each of the three lower court decisions rendered to date, the Department's position has been flatly rejected as contrary to the plain meaning of the statute, unsupported by the legislative history and constitutionally impermissible. *Trinity Evangelical Lutheran Church v. Department of Industrial Relations*, Case No. CV 78 500325, Cir.Ct.Mobile County, Ala. (January

27, 1979); *Roman Catholic Church v. State of Louisiana*, No. 219,660, 19th Jud. Dist. Ct., East Baton Rouge Parish, La. (August 31, 1979); *Grace Brethren Church v. State of California*, Case No. CV 79-93, USDC, CDCal (September 21, 1979).

The precise contentions of the Department in this case were advanced by the State of Alabama in *Trinity Evangelical* and by the Department itself in *Grace Bretheren*. There, the courts reviewed the legislative history of FUTA, including the 1976 amendments which deleted the school exemption provisions of (b)(3); examined the teachings of the Supreme Court in *NLRB v. Catholic Bishop*, 99 S.Ct. 1313 (1979) and *Lemon v. Kurtzman*, 403 U.S. 602 (1971); and considered the potential entanglement by the states in religious activities of the church. Their thoughtful and highly persuasive decisions are adopted here in their entirety, with the following additional comments.

First, a construction of the language "in the employ of a church" which looks to religious function and place of worship, rather than identification of the employing organization, plainly ignores the language employed by Congress not only in the statute itself, but also in its legislative history (H.R. Rept 612, 91st Cong., 1st Sess. 44; "where the employer is the church. . . ."). Moreover, earlier contemporaneous interpretations of the Department's Unemployment Insurance Service, which presumably worked closely with the Congress in the original enactment and subsequent amendment of Section 3309, advised the states that the determination to be made under (b)(1) was the identity of the "employing organization" (ALJ Exh. 4).

Second, the Department's reliance on a reference in the legislative history to the figure of 242,000 employees in all non-profit elementary and secondary schools as evidence of Congressional intent to cover employees of church schools is wholly misplaced. Department testimony in this case reflects that the figure is without meaning unless accompanied by the raw data and, admittedly, the record is silent as to Congressional understanding of the figure or the supporting data. In any event, a legislative cloak embracing integral church functions can hardly be woven with such a slender thread.

Third, the notion that complete Congressional silence in the legislative history evidences its intent to cover church schools by deleting the school exemption in subsection (b)(3) is unwarranted in the absence of definitive statutory language. Indeed, where, as here, the Congress manifested concern as to the constitutionality of its coverage of state employees in light of a recent Supreme Court decision (S.Rep. 94-1265, 94th Cong., 2d Sess. 8-9), yet failed even to address the more obvious constitutional question as to coverage of church schools, the only permissible inference to be drawn from that silence is that Congress was acutely aware of the limitations of legislative authority and had not the slightest intention of entangling government in church function.

And fourth, the Department's construction of Section 3309(b) is inconsistent with government interpretations of the term "church", as used elsewhere throughout the Internal Revenue Code, to include church schools. See e.g., 26 C.F.R. 1.1508-1. Common sense, if nothing else, dictates that like terms in a statute be

given like interpretations in the absence of a clearly expressed Congressional intention to the contrary. Admittedly, no such expression is to be found in the voluminous legislative history of FUTA.

RECOMMENDATION

For the foregoing reasons, it is recommended that the Secretary make a determination that the States of Alabama and Nevada are in compliance with the Federal Unemployment Tax Act and certify each to be entitled to federal grants to pay for the costs of administering their unemployment laws.

/s/ WILLIAM A. GERSHUNY
WILLIAM A. GERSHUNY
Administrative Law Judge

Dated: October 11, 1979
Washington, D.C.

Appendix K
United States of America
Department of Labor
Conformity Proceeding

In the Matter of
U.S. DEPARTMENT OF LABOR
VERSUS
STATE OF ALABAMA DEPARTMENT OF INDUSTRIAL RELATIONS AND STATE OF NEVADA EMPLOYMENT SECURITY DEPARTMENT

DECISION OF THE SECRETARY

The unemployment compensation laws of the States of Alabama and Nevada must be determined by the Secretary of Labor, by October 31, 1979, to be in conformity with the requirements of the Federal Unemployment Tax Act (26 U.S.C. 3301-3311), hereinafter referred to as FUTA, in order to be certified under section 3304(c) of FUTA and thereby to have those States received the benefits for themselves and their inhabitants provided by Title III of the Social Security Act, 42 U.S.C. 501-504, and FUTA. Such benefits include federal grants for the administration of their unemployment compensation laws as well as tax credits for private employers within the states. The purpose of this proceeding is to determine whether the Alabama and Nevada unemployment compensation laws are in conformity and/or in substantial compliance with the requirements of FUTA.

The issue is whether FUTA requires State unemployment compensation laws to provide coverage for employees of non-profit church-related elementary and secondary schools. Alabama and Nevada take the position that it does not. It is the position of the U.S. Department of Labor, hereinafter referred to as the Department or USDOL, that the unemployment compensation laws of such States are not in conformity with the requirements of FUTA, and/or that such States are not in substantial compliance with such requirements, because of the lack of such coverage.

Pursuant to the request of the States of Alabama and Nevada, a hearing was held before an Administrative Law Judge, hereinafter sometimes referred to as the Judge, at which an opportunity was afforded to examine witnesses and introduce documentary evidence relating to the issues. Thereafter, parties and interested parties filed briefs and presented oral argument.

On October 11, 1979, the Judge issued a recommended decision in the matter, in which he found that Alabama and Nevada are in compliance with the requirements of FUTA, and he recommended that I so determine.

The U.S. Department of Labor has filed exceptions to the Administrative Law Judge's recommended decision. It contends that the Judge erred in finding that the Alabama and Nevada unemployment compensation laws are in conformity with the requirements of FUTA and that those States are in compliance therewith.

An outline of some of the statutory background would be helpful in the consideration of the issue. During the depression of the 1930's, when unemployment ex-

ceeded 25 percent of the work force in the nation, Congress enacted legislation which was the forerunner of FUTA to provide for the establishment of unemployment compensation programs in the States. Beginning in the mid-1950's, there was a steady expansion of unemployment insurance coverage under the Federal-State unemployment compensation program. For example, originally employers of eight or more employees were covered. In 1954, coverage was extended to employers of four or more employees.

The Employment Security Amendments of 1970 further extended coverage to employers of one employee. In addition, they amended the Internal Revenue Code of 1954 by adding subsections (6) (A) and (B) to the existing section 3304(a), and a new section 3309. The new section 3304(a) (6) (A) required State laws to cover, for compensation purposes, employees of nonprofit organizations and employees of State hospitals and institutions of higher education.

Subparagraph (b) of the new section 3309 permitted the States to exclude, *inter alia*, from the mandatory coverage of nonprofit organizations and State hospitals and institutions of higher education, service performed:

> (1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches;
>
> (2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;

(3) in the employ of a school which is not an institution of higher education;

See 84 Stat. 697-698; 26 U.S.C. 3309(b)(1), (b)(2) and (b)(3) (1970).

What followed thereafter is described in the Memorandum of Points and Authorities submitted by the USDOL, hereinafter sometimes referred to as USDOL Memo, at pages 9-11 (footnotes are omitted):

> Even the increasingly expanded Federal-State Unemployment Compensation Program, however, proved inadequate in the 1974-1975 economic downturn. Late in 1974, the Congress passed two remedial laws as temporary measures. The Emergency Unemployment Compensation Act of 1974 (Pub. L. No. 93-573, 88 Stat. 1869) was similar to its predecessor, the Emergency Unemployment Compensation Act of 1971, and further extended benefits for individuals in the regular unemployment compensation programs. The Emergency Jobs and Unemployment Assistance Act of 1974, Pub. L. No. 93-567, 88 Stat. 1845, enacted, in Title II, a Special Unemployment Assistance (SUA) Program. This program was intended to cover an estimated 12 million workers who were not covered by the regular unemployment compensation laws, including state and local government employees, agricultural workers, domestic employees and employees of nonprofit elementary and secondary schools. The SUA program was administered by state unemployment compensation agencies as the agents of the Secretary of Labor, with the federal government assuming the costs of benefits and of program administration.
>
> The SUA program was, in effect, replaced by the Unemployment Compensation Amendments of

1976, Pub. L. No. 94-566, 90 Stat. 2667. These amendments were designed to provide coverage under the permanent Federal-State Unemployment Compensation Program for substantially all the nation's wage and salary earners and thereby to eliminate the need for the temporary SUA program. H. R. Rep. No. 755, 94th Cong. 1st Sess. 1 (1975). *The 1976 amendments specifically eliminated the exclusion for service performed in the employ of nonprofit elementary and secondary schools which had been added in 1970 as part of the new § 3309(b) of the Internal Revenue Code of 1954.* (Italics supplied.)

The question is whether the 1976 amendment repealing the exemption for nonprofit elementary and secondary schools contained in section 3309(b)(3) of FUTA requires the coverage of church-related schools.

The States of Alabama and Nevada contend, among other things, that under the plain language of section 3309(b)(1) of FUTA (26 U.S.C. 3309(b)(1)) church schools are exempt from coverage under FUTA; that the plain language of a statute is controlling unless the legislative history reveals clear evidence of a contrary intent; that church schools are exempt under section 3309(b)(1)(A) because they generally have no separate legal status from their governing church, and because they are an integral part of their governing church; that church schools, and others not technically a legal part of their church, are also excluded from coverage under section 3309(b)(1)(B) because they are operated primarily for religious purposes. Alabama and Nevada argue that the pertinent legislative history does not indicate that Congress intended employees of church schools to be covered under FUTA. It is their position that such cov-

erage would violate the freedoms guaranteed to religious groups under the First and Fourteenth Amendments to the Constitution; that it would involve excessive governmental entanglement in church affairs, and therefore would be unconstitutional under the tests established by the Supreme Court.

The provisions of 26 U.S.C. 3304(a)(6)(A) and 3309, as amended by the 1976 Amendments, particularly the amendment repealing the exemption for nonprofit elementary and secondary schools provided in section 3309(b)(3), have been interpreted by the U.S. Department of Labor as requiring unemployment compensation coverage of all services performed in the employ of all private nonprofit elementary and secondary schools, including church-related schools, with certain exceptions as provided in 26 U.S.C. 3309(b). In accordance with USDOL's interpretation, the only services performed in church-related elementary and secondary schools recognized as being within the scope of the exemption permitted by section 3309(b)(1) of FUTA, (aside from the permitted § 3309(b)(2) exceptions) are those strictly church duties (as distinguished from school duties) performed by church employees at the schools pursuant to their church responsibilities. (See USDOL Memo, pp. 1-2; Exceptions, pp. 11-13.)

The position of the Department of Labor, as presented on pages 11 through 22 of its Memorandum of Points and Authorities, including the footnotes incorporated therein, is set out below.

"I

"THE LEGISLATIVE HISTORY OF FUTA SUPPORTS THE DEPARTMENT'S INTERPRE-

TATION THAT ALL CHURCH-RELATED SCHOOLS ARE NOW SUBJECT TO COVERAGE

"While FUTA on its face gives little guidance concerning the interrelation between the repeal of the 1970 § 3309(b)(3) school exemption and the retention of the § 3309(b)(1) religious organization exemptions, its history and remedial purposes militate strongly in favor of construing the statute to cover *all* elementary and secondary schools, including those organized by the churches in Alabama and Nevada (and all other states), within state unemployment insurance coverage.

"A. *The Unemployment Compensation Amendments of 1976 represent the culmination of congressional efforts to provide virtually universal unemployment insurance coverage and should be construed in that light.*

"Since the original enactment of the Federal-State Unemployment Compensation Program, Congress has followed an unbroken path towards expansion of unemployment insurance coverage. This movement accelerated in the 1970's and culminated in the 1976 Amendments which provide coverage under the permanent Federal-State Unemployment Compensation Program for substantially all of the nation's wage and salary earners. H.R. Rep. No. 755, 94th Cong. 1st Sess. 1 (1975).

"This steady progress towards universal unemployment insurance coverage, together with the remedial nature of FUTA, trigger the application of several well-accepted rules of statutory construction, including the requirement that a statute will be interpreted in light of the purposes it seeks to achieve and the evils it seeks to remedy. *Fasulo v.*

United States, 272 U.S. 620 (1926); *Holy Trinity Church v. United States*, 143 U.S. 457-472 (1892). Statutes must be given effect in accordance with the purpose manifested by Congress. *United States v. Ohio*, 354 F.2d 549, 555 (6th Cir. 1966)*[13]; *Commissioner of Internal Revenue v. Bilder*, 369 U.S. 499 (1962). This directive takes on particular significance in the context of the instant case since remedial social legislation is to be construed liberally in favor of the workers whom it was designed to protect. *Wirtz v. Ti Ti Peat Humus Co.*, 373 F.2d 209, 212 (4th Cir. 1967)*. See also *United States v. Silk*, 331 U.S. 704 (1947); *Phillips Inc. v. Walling*, 324 U.S. 490 (1945); *Israel-British Bank (London) Ltd. v. F.D.I.C.*, 536 F.2d 509, 513 (2d Cir. 1976). Finally, there is a requirement that remedial legislation be broadly construed and that exceptions be narrowly applied. *Phillips Inc. v. Walling, supra*, at 493. See also *Korherr v. Bumb*, 262 F.2d 157, 162 (9th Cir. 1958); *Hamblen v. Ware*, 526 F.2d 476, 477 (6th Cir. 1975).[14]

"B. *Congress intended the unemployment compensation amendments of 1976 to extend unemployment insurance coverage to services performed for all elementary and secondary schools*

"In order to properly understand the objective behind the 1976 Amendments, it is necessary to briefly review the 1970 Amendments.

"[13] The use of an asterisk (*) denotes the leading case in each line of cases cited for a single proposition.

"[14] Under an analogous remedial statute, the Fair Labor Standards Act, it has been held that exemptions are to be narrowly construed against the employer *Schultz v. Louisiana Trailer Sales, Inc.* 428 F.2d 61, 67 (5th Cir. 1970). *Arnold v. Ben Kanowsky, Inc.* 361 U.S. 388* (1960); *Mitchell v. Kentucky Company*, 359 U.S. 290, 295, 79 S.Ct. 756, 759, (1959); *Yogurt Master, Inc. v. Goldberg*, 310 F.2d 53, 55 (5th Cir. 1962)."

"The Employment Security Amendments of 1970, by adding new language in 26 U.S.C. §§ 3304(a)(6), 3306(c)(8), and 3309(a)(1)(A), required State-law coverage of individuals employed by nonprofit organizations, including institutions of higher education. The legislative reports which accompany the amendments unmistakably show that Congress was concerned about the need of employees of church-related schools for protection against wage loss resulting from unemployment and intended to bring individuals employed in nonprofit institutions of higher education, including those operated by religious institutions under program coverage. H.R. Rep. No. 612, 91st Cong., 1st Sess. 11 (1969).

"In fact, Congress, quite explicitly limited the availability of the § 3309(b)(1) exemption as applied to institutions of higher education. See H.R. Rep. No. 612, 91st Cong., 1st Sess. 44 (1969), and S.Rep. No. 752, 91st Cong. 2d Sess. (1970) at 48-49.[15] Congress clearly expected that the "operated primarily for religious purposes" language contained in § 3309(b)(1)(B) would be narrowly construed, preventing its application to educational institutions of higher education. The Department of Labor has followed the congressional mandate for coverage of private nonprofit organizations, including institutions of higher education, and consistently interpreted the 1970 Amendments to require State law coverage of *all* institutions of higher education except for the narrow category of seminaries and novitiates.

"In light of Congress' intention in 1970 to bring

"[15] Congress' references to "separately incorporated" institutions in the reports were clearly examples of the delineation of coverage, and were not intended as a full explanation of the extent of such coverage."

religiously affiliated colleges and universities within coverage, and in the face of the Department's subsequent adoption of this interpretation, Congress' description, in 1976, of the objective behind the repeal of § 3309(b)(3) is made even more informative. See H.R. Rep. No. 755, 94th Cong., 1st Sess. 56 (1975) and S.Rep. No. 1265, 94th Cong. 2d Sess. 2 (1976).

"Any lingering doubt concerning Congress' desire to extend coverage to *all* elementary and secondary schools is satisfied by reference to the statistical data cited by Congress regarding the anticipated effect of the 1976 Amendments. The Senate Report, S.Rep. No. 1265, 94th Cong., 2d Sess. 8 (1976), estimated the number of new employees who would be covered as a result of the repeal of § 3309(b)(3) at 242,000. This figure is essentially identical to the then available best estimate of the total number of employees in *all* nonprofit elementary and secondary schools.[16] Without the inclusion of employees of church-related elementary and secondary schools, the figure would have been substantially less than 242,000 because the staff of church-related elementary and secondary schools comprise more than half of the staff of all non-public elementary and secondary schools in the United States.[17]

"[16] At the September 26, 1979 hearing in this matter it was stipulated between the parties that the 242,000 figure was supplied to Congress by DOL. (Transcript p. 86). Moreover, the testimony of Mr. Louis Benenson at that hearing establishes that the 242,000 figure clearly included all employees of church-related elementary and secondary schools. (Transcript, pp. 69-73) See also DOL Exhibits 6-8.

"[17] According to the Census Bureau's *Statistical Abstract of the United States* (1977 ed.) there were 261,000 full-time teachers in the nonprofit elementary and secondary schools in 1975, of which 150,000 were in Roman Catholic schools, pp. 145, 147, tables 235, 237. *** Compare DOL Exhibits 6-8."

"Thus, in setting forth the projected impact of the repeal of § 3309(b)(3), Congress could only have contemplated that the repeal of § 3309(b)(3) would bring *all* elementary and secondary schools within FUTA coverage. Considering the total absence of any indication that Congress intended an alternative interpretation, and noting particularly the necessity that the exceptions to coverage be construed narrowly, the Department's construction of the Act is virtually mandatory.

"II

"THE GENERAL PRINCIPLE OF CONSTRUING STATUTES TO AVOID UNNECESSARY CONSTITUTIONAL DECISIONS IS INAPPLICABLE IN THIS CASE.

"The general principle that a court should construe a statute to avoid unnecessary constitutional decisions is inapplicable in this case, because the Department's interpretation that due to the elimination of the exemption formerly provided in 26 U.S.C. § 3309(b)(3), church-related schools are now subject to unemployment insurance coverage is correct in light of the legislative history discussed above and, in any event, does not present any constitutional infirmities. There are two reasons why the Department's interpretation does not give rise to any constitutional problems.

"First, unemployment insurance coverage of church-related elementary and secondary schools does not create excessive entanglements. To the contrary, the necessary involvement between such schools and the government would be minimal. While certain records would have to be maintained and determinations of eligibility for benefits would have to be made, there would be no need to become involved in such issues as resolving disputes as to

church doctrines in order to resolve claims for benefits. See the testimony of Mr. Bernard Street (Transcript, pp. 107-108). With respect to this point it is noteworthy that the First Amendment does not prohibit all involvement between church and state, but merely entanglement which is deemed *excessive*. *Walz v. Tax Commission*, 397 U.S. 664 (1970). Moreover, not all procedures for surveillance and auditing result in excessive government entanglement with religion. See, e.g., *Wolman v. Walters*, 433 U.S. 229 (1977); *Committee for Public Education v. Levitt*, 461 F. Supp. 1123 (S.D. N.Y. 1978). If the surveillance and monitoring occur primarily at the governmental level and do not require interference with the internal operations of the schools, the entanglement is not excessive. *Committee for Public Education v. Levitt, supra.*[18] Consistent with the cases just cited, the amount of involvement between government and churches resulting from an adoption of the Department's interpretation of 26 U.S.C. § 3309(b) cannot reasonably be viewed as rising to the level of excessive entanglements.

"The second reason why the Department's interpretation of § 3309(b) does not present constitutional infirmities is that, with one exception not here relevant[19], FUTA does not *mandate* that state un-

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"[18] These very same arguments were recently made on behalf of the Archdiocese of Milwaukee, et al. as intervenors in *Alice Decker, et al. v. USDOL, et al.*, E.D. Wisconsin, C.A. No. 78-C-634 in a memorandum in support of the intervenors' motion for reconsideration and amendment of the court's Decision and Order enjoining the state and federal administrators of Title II of the Comprehensive Employment and Training Act of 1973, as amended, 29 U.S.C. § 841, *et seq.* (CETA), from funding CETA positions in church-related elementary and secondary schools.

"[19] Section 3304(a)(6)(A) of FUTA preludes payment of benefits to teachers unemployed between academic terms under certain circumstances."

employment insurance laws deny any individuals unemployment benefits. Thus, while 26 U.S.C. §3304(a)(10) permits the state to provide for the denial of benefits to individuals discharged for misconduct in connection with their work, etc., the state is not *required* to provide for such a denial.[20]

"Thus, even assuming, *arguendo*, that the extension of coverage to church-related elementary and secondary schools would result in excessive entanglement as a result of current provisions of state law regarding the denial of benefits for misconduct, etc., the above factor, we submit, precludes a holding that the Department's interpretation of FUTA is facially unconstitutional on entanglement grounds since the Departments interpretation does not necessarily result in the type of entanglements about which Alabama and Nevada are so concerned. It is in this context that it is also appropriate to consider the recent decision in *N.L.R.B. v. Catholic Bishop of Chicago*, 99 S.Ct. 1313 (1979) in which the court found that the National Labor Relations Act (NLRA) coverage of parochial schools raised "serious constitutional questions" (albeit without finding unconstitutionality). The Court expressed two concerns in that case, one of which can be best described as involving the 'chilling effect' of mandatory collective bargaining on the ability of clerical authorities to administer their schools and the other relating to the potential problems created by requiring the Board to adjudicate employer/employee disputes in a sectarian school setting. Unlike the situation in the *Catholic Bishop* case, *supra*, unemployment insurance coverage does not necessitate state

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"[20] See section 25-4-78-(3), Code of Alabama 1975, Alabama Exhibit, para. 79, and section 612.385 of Nevada Revised Statutes (1979) and Nevada Exhibit A, paragraphs 40 through 44."

involvement in the development of curriculum, faculty standards, working conditions or any other aspect of school operations. In fact, the unemployment insurance system would generally only be triggered *after* an employee had been terminated and his or her connection with the school severed.

"To the extent that it may be argued that the second area of the Supreme Court's concern regarding unfair labor practice adjudications in *Catholic Bishop, supra,* raises some possible parallels with certain aspects of the unemployment insurance system, it must be recognized that these problems arise because of state law provisions and not because of the Department's interpretation of § 3309(b) of FUTA. The point to be made is simply that potential entanglements cannot be used to negate unemployment insurance for former employees since coverage itself does not *inevitably* create any entanglements.

"The *Catholic Bishop* case, *supra,* is further distinguishable in that despite coverage by a state unemployment insurance law, the church school employer remains free to employ or not to employ any individual it chooses on whatever basis it desires. The only impact of unemployment insurance coverage is that some of these decisions will now have some financial impact, albeit an impact no greater than that borne by private non-sectarian schools. The concept that the first amendment protects both the practice of religion and also spares one the financial burdens of such practice was rejected in *Braunfeld v. Brown,* 336 U.S. 599 (1961) where the Court concluded that a statute could not be invalidated on free exercise grounds merely because it made the practice of religion more expensive.

"Nor is there any basis whatsoever for DIRSA's

[the Department of Industrial Relations of the State of Alabama's] and NESD's [the Nevada Employment Security Department's] apparent belief that employer/employee relations of church-related schools in Alabama and Nevada respectively are constitutionally immune from such impact. Clearly, they can claim no exemption from child labor laws, *Prince v. Massachusetts*, 321 U.S. 158 (1944) or minimum wage requirements, *Mitchell v. Pilgrim Holiness Church Corp.*, 210 F.2d 879 (7th Cir. 1954), certiorari denied, 347 U.S. 1013 (1954). Moreover, DIRSA and NESD acknowledge the authority of the government to require and the obligation of church-related schools in Alabama and Nevada respectively to maintain a safe workplace. Alabama Exhibit A, para. 67; Nevada Exhibit A, para. 12.

"The right of individuals to send their children to religiously sponsored schools has been established for more than fifty years. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). The Department seeks no alteration in that principle. The Department's interpretation of § 3309(b) of FUTA will not require an examination into the religious motivations or doctrine of church-related elementary or secondary schools or in their employment decisions. The Department's position is uncomplicated. Employees of *all* elementary and secondary schools who become unemployed are entitled to coverage. Where such school activities have been performed by the claimant section 3309(b)(1) or the equivalent state law provision is not available as an exemption because coverage of elementary and secondary school activity was intended by Congress to protect former school employees from the vicissitudes of unemployment. To conclude otherwise would be to carve out a special rule based upon religious motivation

offending the Establishment Clause of the First Amendment to the Constitution."

The Department of Labor takes exception to a number of statements, findings and conclusions contained in the Judge's recommended decision in this proceeding, as well as to his failure to make certain findings of fact. On pages 8-10 of the Department's Statement of Exceptions, hereinafter referred to as Exceptions, it states:

"The primary exception which USDOL takes to Part III [of the Judge's recommended decision, on pages 4-5 thereof] stems from the conclusion expressed in the first paragraph of that section to the effect that, since "(e)ssentially all the facts relevant to the issues presented have been stipulated by the parties . . . no recommended findings need be made." While the parties did stipulate as to many facts, additional relevant evidence was introduced at the time of the evidentiary hearing as to which the parties did not stipulate. Specifically, this evidence primarily pertained to both (a) the development by USDOL of the 242,000 figure contained in Senate Report No. 1265, 94th Cong., 2d Sess. 8 (1976), and which was used to explain the estimated number of additional elementary and secondary school employees who would be covered as a result of the repeal of FUTA § 3309(b)(3); and (b) the fact that it is unnecessary to get involved in church doctrine in determining whether a former employee of a church-related school is entitled to benefits. Accordingly, USDOL takes exception to the absence of such recommended findings and urges that the Secretary correct this error by adopting the following findings of fact:

"(1) Prior to the enactment of the Unemployment Compensation Amendments of 1976,

USDOL, at the request of Congressional staff, prepared an estimate of the total number of employees of all non-profit elementary and secondary schools within the United States. The estimate so prepared was 242,000. Tr., 67-73. DOL Exhibits 6-8.

"(2) This 242,000 figure represented a statistical determination of the number of non-profit elementary and secondary school employees who were not covered under FUTA prior to the 1976 Amendments. Tr., 75.

"(3) USDOL's 242,000 estimate of the total number of all non-profit (church-related and non-church related) elementary and secondary school employees was furnished by USDOL to staff persons in Congress. Tr., 86.

"(4) In determining the eligibility of a former employee of a church-related elementary or secondary school for Supplemental Unemployment Assistance it is unnecessary to determine that which constituted church doctrine and that which did not. Tr., 104-107.

"(5) In determining the eligibility of a former employee of a church-related institution of higher education for unemployment compensation it is similarly unnecessary to resolve church doctrine. Tr., 104-107.

"(6) In determining the eligibility for unemployment compensation of a former employee of a church-related school who either voluntarily quit or who was discharged for misconduct it is unnecessary to draw a determination as to what constitutes the actual doctrine of the church. Tr., 108. See

also Tr., 126-127 & 136. Rather, the relevant inquiry revolves around the understanding of the parties and the intent of the claimant. Tr., 108 & 122-123.

"(7) In an unemployment compensation case the person deciding the case does not establish or try to force any change to an employer's work rules, Tr., 123. Similarly, a hearing officer in such a case cannot order reinstatement of the employee in the event a work rule is found to be unjustified. Rather, the only remedy is the grant of benefits. Tr., 124.

"In addition, USDOL takes exception to the generalized summary of the stipulated facts concerning the Roman Catholic, Baptist and Lutheran elementary and secondary schools in that the summary as to each of those groups of church-related schools fails to recognize that such schools serve the same basic educational purpose and have the same basic academic structure and courses of instruction as non-church-related elementary and secondary schools. Alabama Exhibit A, para. 33, 34, 45, 46, 66, 67, 71; Nevada Exhibit A, para. 11, 12, 17, 32. Further, this summary fails to recognize that these church-related schools are subject to State and local government fire, health and safety requirements. Alabama Exhibit A, para. 47 and 67."

In my opinion, the above-quoted exceptions of the Department are well-founded and valid. I find that the findings of fact recommended by the Department, numbered 1-7, quoted above, are supported by the record and are proper, and I adopt them as my own.

The Department takes exception to the conclusions expressed by the Judge in Part V, pages 7-9 of his rec-

ommended decision for several reasons, discussed on pages 13-18 of its Exceptions which are set out below, including the footnotes incorporated therein.

"First, little or no weight should be afforded the three cases cited as precedent in this section. This is so because the USDOL was not a party to either *Trinity Evangelical Lutheran Church v. Department of Industrial Relations*, Case No. CV 78 500325, Cir. Ct. Mobile County, Alabama (January 27, 1979) or *Roman Catholic Church v. State of Louisiana*, No. 219,660, 19th Jud. Dist. Ct., East Baton Rouge Parish, La. (August 31, 1979), and thus did not have the opportunity to present relevant evidence or even its arguments to those courts. While USDOL was a party in *Grace Brethren v. State of California*, Case No. CV 79-93, USDC CD Calif. (September 21, 1979) the decision rendered in that case was simply on plaintiffs' motion for a preliminary injunction. Not only has there not yet been a final hearing in *Grace Brethren*, but consideration is currently being given to filing an appeal from that interlocutory order.

"In any event, with respect to these three decisions, it is important to realize that to a great extent the cases went off on constitutional tangents which, in the present proceeding, are both unauthorized and unwarranted.[7] Moreover, by adopting those

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" [7] See Mr. Streett's testimony at the evidentiary hearing, TR., 103-129, to the effect that in determining a claimant's eligibility for unemployment compensation it is unnecessary for the State to become involved in church doctrine. However, assuming, *arguendo*, that there do exist certain entanglements between covered church-related schools and the State as a result of its administration of its unemployment compensation law, it does not necessarily follow that such State involvement infringes upon the First Amendment rights to church-related schools. See USDOL's *Memorandum of Points and Authorities*, pp. 17-18. See also the decision in *Stewart*,

three decisions here in their entirety, the Administrative Law Judge has inexplicably exceeded his authority by making conclusions of law as to the constitutionality of USDOL's interpretation of § 3309 of FUTA. See Rule of Procedure 14(b). 44 F.R. 47649 (August 14, 1979).

"The remaining USDOL exceptions to Part V relate to four "additional comments" contained therein.

"With respect to the first additional comment it need only be noted that the Recommended Decision fails to recognize that under USDOL's interpretation of § 3309 of FUTA it is appropriate to first determine the identity of the employing organization in order to determine the applicability of the § 3309(b) (1) exemption and, if the employer may be both a church and a church-related school, to thereafter determine whether the services performed for such employer are church duties or church school duties. If the latter, the § 3309(b) (1) exemption is inapplicable.

"The second additional comment essentially states that no reliance should be placed upon the reference in the legislative history to the 242,000 figure previously discussed. USDOL takes excep-

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et al. v. Commissioner, U.S. Tax Court, No. 1332-78 (July 31, 1979) and *Hatcher v. Commissioner*, U.S. Court of Appeals, Tenth Circuit, No. 78-1883 (July 27, 1979). In each of these cases there was a governmental inquiry into the religious sect in order to determine whether the taxpayer qualified for an exemption on religious grounds from the self-employment tax. In neither case did the court find a First Amendment problem. These cases therefore illustrate that even where there is an inquiry into the religious tenets of a person and/or a particular sect, there is no violation of the First Amendment so long as the provision in question has a secular purpose and it does not foster excessive government entanglement with religion."

tion to this conclusion for the reason that the record reflects the finding stated by Congress that the additional coverage occasioned by the deletion of the old § 3309(b) (3) exemption would amount to 242,000 employees. That number, as evidenced by the record, represented USDOL's best estimate of the total of all (church-related and non-church-related) non-profit elementary and secondary school employees. If any presumption is to be drawn with respect to Congress' understanding of what this figure represented, that presumption must be that Congress considered the testimony and data it received and knew what it said. Any other presumption would be improper. Furthermore, it is apparent from the final sentence of this second additional comment that the Administrative Law Judge's confusion as to USDOL's position in this case stems from his inability to distinguish between 'church functions' and 'church-school functions.' It is only services related to those latter functions that USDOL contends are covered.

"USDOL takes exception to the third additional comment for the reason that the legislative history to the 1976 Amendments to FUTA clearly reflects that Congress intended to extend coverage to all 'nonprofit elementary and secondary schools' by deleting the exemption previously applicable to such schools. See USDOL's Memorandum of Points and Authorities, pp. 11-16. If Congress had intended to limit the extension of coverage to only that small proportion of non-profit elementary and secondary schools which are non-church-related,[8] it is only reasonable that they would have so specified. This inference is strengthened by the fact that coverage

" [8] Fewer than 20 percent of the total of all non-profit elementary and secondary school employees are employed by non-church-related schools. DOL Exhibit 1, pg. 1."

of church-related institutions of higher education had been covered since the time of the 1970 Amendments. Even more support for this conclusion can be found in the fact that all non-profit elementary and secondary school employees not otherwise covered by State laws were covered by SUA, and by the fact that the Unemployment Compensation Amendments of 1976 were designed to 'eliminate the temporary Special Unemployment Assistance Program' and extend 'permanent' coverage to 'substantially all the workers . . . covered by SUA.' H.R. Rep. No. 94-755 at 17. Finally, USDOL takes exception to the fourth additional comment for the reason that there is no support for the conclusion expressed that the Department's construction of § 3309 (b) is inconsistent with other governmental interpretations of the term 'church' used elsewhere in the Internal Revenue Code. Nowhere in the Internal Revenue Code is there a definition of the term 'church' which includes church-related elementary and secondary schools. Not surprisingly, the regulation relied upon as authority for the proposition stated (26 CFR § 1.1508-1) is nonexistent.[9]"

After considering all the evidence and arguments concerning the issues, it is my conclusion that the views expressed by the Department of Labor in its Memorandum of Points and Authorities and in its exceptions to the Judge's decision are correct, for the reasons and on the basis of the authorities indicated therein. FUTA, as amended by the 1976 amendments, requires State unemployment compensation laws to provide coverage for

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" [9] If the reference was intended to be to 26 C.F.R. § 508-1 (a) (3) (a) it is inapposite since that regulation clearly does not define "church" as including church-related elementary and secondary schools."

employees of non-profit church-related elementary and secondary schools. The legislative history of the pertinent statutes shows that Congress intended to cover such schools under FUTA. Settled principles of statutory construction support such coverage, particularly the rules that remedial social legislation should be liberally and broadly construed as to coverage so as to accomplish its purpose and that exemptions from such statutes should be narrowly construed. I believe that covering such schools under FUTA does not create excessive governmental entanglement with religion and is within the limits of government regulation provided by the Constitution.

Accordingly, I find that the Alabama and Nevada unemployment compensation laws fail to conform to the provisions of the Federal Unemployment Tax Act, as amended. In accordance with the last sentence of section 3304(c) of that Act (26 U.S.C. §3304(c)) I find that those States have failed to amend their unemployment compensation laws so that they contain each of the provisions required by reason of the enactment of the Unemployment Compensation Amendments of 1976 to be included therein, specifically the provision required by reason of the enactment of amendments to section 3309(b) of FUTA. I also find that Alabama and Nevada have, with respect to the 12-month period ending on October 31, 1979, failed to comply substantially with that provision.

Dated at Washington, D.C. this 31st day of October, 1979.

/s/ RAY MARSHALL
RAY MARSHALL
Secretary of Labor

Appendix L
United States District Court
Central District of California
Case No. CV 79-93 MRP
Opinion

GRACE BRETHREN CHURCH
AND REVEREND DAVID L. HOCKING, ETC., ET AL.,
Plaintiffs,

VERSUS

STATE OF CALIFORNIA, ETC., ET AL.,
Defendants.

Case No. CV 79-162 MRP
Opinion

THE LUTHERAN CHURCH-MISSOURI SYNOD, A
NON-PROFIT MEMBERSHIP CORPORATION ON BEHALF
OF 85 MEMBER LUTHERAN CHURCHES, ETC., ET AL.,
Plaintiffs,

VERSUS

THE STATE OF CALIFORNIA EMPLOYMENT
DEVELOPMENT DEPARTMENT, ET AL.,
Defendants.

At the height of the depression of the 1930's, unem-

ployment in the nation exceeded 25% of the work force. In an attempt to alleviate some of the resulting hardships, Congress enacted Title IX of the Social Security Act of 1935 (herein "the Act"), Pub. L. No. 94-271, 49 Stat. 620, the forerunner of the Federal Unemployment Tax Act (herein "FUTA") (now codified at 26 U.S.C. §§ 3301-3311). Employers with eight or more employees were made subject to an excise tax computed as a percentage of wages payable for services performed in "employment" as defined in the Act. 49 Stat. 635. The employer was, however, entitled to a credit against his federal tax liability for up to 90% of any contributions to a fund established under a federally approved state unemployment compensation law. 49 Stat. 639-640. In addition, Congress provided in Title III of the Social Security Act (codified at 42 U.S.C. §§ 502-504) for federal grants to the states to pay for costs incurred in administering the state unemployment compensation laws. 49 Stat. 626. Given this incentive, all states enacted such laws which, in order to meet the requirements for federal approval,[1] essentially paralleled the coverage of FUTA.[2]

The federal unemployment tax provisions remained substantially unchanged for two decades after enactment.[3] Then in the mid-1950's, a steady expansion of unemployment insurance coverage commenced. For example, in 1954 Congress extended the tax liability to

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[1] 26 U.S.C. § 3304(a) contains the specific requirements for approval of a state unemployment insurance program.

[2] *See, e.g., Cal. Unempl. Ins. Code* §§ 1-15000 (West 1972).

[3] In 1939, FUTA was made a part of the Internal Revenue Code, 53 Stat. 1, 183.

employers with four or more employees and enacted an unemployment compensation program for federal employees.[4] In 1958, an unemployment compensation program was enacted for Armed Services employees.[5]

In 1970, § 3304(a)(6)(A) was added to FUTA requiring the states to extend unemployment insurance coverage to employees of non-profit organizations,[6] effective January 1, 1972. Subparagraph (b) of the new § 3309 permitted the states to exclude from coverage those employees performing, *inter alia*, services:

> (1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;
>
> (2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;
>
> (3) in the employ of a school which is not an institution of higher education.

In response to these amendments, the State of California (herein "the State"), extended coverage under the California Unemployment Insurance Code to services performed for non-profit organizations with the exception of those specified in § 3309(b).

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[4] *See* Pub. L. No. 767, 68 Stat. 1130.

[5] *See* Pub. L. No. 85-848, 72 Stat. 1087, 1088.

[6] *See* the Employment Security Amendments Act, Pub. L. No. 91-373, 84 Stat. 695. Pursuant to 26 U.S.C. §§ 3301 & 3306(c)(1976), nonprofit organizations are exempt from paying *federal* unemployment insurance tax, even though the federal government requires the state's programs to cover such organizations.

Effective January 1, 1978, Congress amended § 3309 by deleting Subsection (b)(3) which permitted exemption of services performed by individuals "in the employ of a school which is not an institution of higher education." Effective the same date, California amended § 634.5(c) of its Unemployment Insurance Code to maintain consistency with the federal law.

This case arises out of the Secretary of Labor's (herein "the Secretary") interpretation of the 1978 amendment to § 3309(b) as requiring extension of unemployment compensation coverage to employees of primary and secondary religious schools, exempting only those individuals who perform "strictly church duties" during more than half of their working time.[7]

I
THE ISSUES PRESENTED

The plaintiffs in these two cases are religious organizations which operate private elementary and secondary schools. In No. 79-0162 (the "Lutheran" case), plaintiff is a "Synod" consisting of 85 member churches which operate private schools. The Lutheran case was originally brought in the Superior Court of the State of California against the Employment Development Department of the State of California (herein the "EDD");

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[7] 26 U.S.C. § 3306(d) specifies that "if the services performed during more than one-half of any such pay period by an employee for the person employing him do not constitute employment, then none of the services of such employee for such period shall be deemed to be employment." Subsection (c)(8) of that section excludes from the definition of employment "service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a)."

Martin Glick, its Director; and the Secretary. The case was removed to this court by the Secretary pursuant to 28 U.S.C. §§ 1441 and 1442. Case No. 79-0093 (the "Grace Brethren" case) was originally brought in this court against these same parties. The State has cross-claimed against the Secretary in both cases.

Both groups of plaintiffs seek a preliminary injunction against the defendants enjoining collection of the unemployment tax with respect to their employees. The Secretary moves for dismissal on the ground that plaintiffs lack standing and that the court lacks jurisdiction to grant the injunctive relief requested by plaintiffs. The Secretary also moves to dismiss the State's cross-claim for declaratory relief on the ground that the State has failed to exhaust administrative remedies. The following discussion will constitute the Findings of Fact and Conclusions of Law in both cases and will apply to both applications for a preliminary injunction as well as to the pending motions.

II
DISCUSSION

A. Standing to Sue the Secretary of Labor

The Secretary argues that since the State's participation in the federal program is voluntary, plaintiffs lack standing to sue him in the present action. It is the Secretary's position that since it is the State which is causing the plaintiffs' alleged damage, both cases must be dismissed as to him.

In order for a plaintiff to have standing under Article III, he must establish that "the asserted injury was the consequence of the defendants' actions, or that pro-

spective relief will remove the harm." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 45 (1976). However, this does not mean that a plaintiff may not sue a governmental defendant who has caused him indirect rather than direct harm. "When a governmental prohibition or restriction imposed on one party causes specific harm to a third party, harm that a constitutional provision or statute was intended to prevent, the indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights." *Warth v. Seldin*, 422 U.S. 490, 505 (1975); *Gladstone Realtors v. Village of Bellwood*, No. 77-1493 (Sup. Ct. April 17, 1979). However, it does make it "substantially more difficult to meet the minimum requirement of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm" *Warth*, 422 U.S. at 505. The injury may be indirect, *see United States v. SCRAP*, 412 U.S. 669, 688 (1973), but it must be "fairly traceable to the defendant's acts or omissions." *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 261 (1977).

In the present case, the State has for many years maintained an unemployment compensation program upon which a large number of employees depend. If California should fail to remain in accord with FUTA regulations, it risks decertification of its program and the substantial hardship to California employers and employees which would result from termination of its FUTA benefits. Thus, while initial participation in FUTA is voluntary, once a state has established an unemployment compensation program, it is compelled to

conform its program to FUTA regulations as they may be amended from time to time.

The fact that the states are under compulsion to adopt the Secretary's interpretation of the modication of § 3309(b) is evidenced by the directive from the U.S. Department of Labor to "All State Employment Security Agencies" from Lawrence W. Rogers, Administrator of Field Operations (herein "the Directive"). The Directive states that "Secretary Marshall's decision concerning unemployment insurance coverage of services performed for church-related schools . . . was clearly intended to result in State coverage of church-related elementary and secondary schools." The Secretary's interpretation was not merely advisory. On the contrary, the Secretary was fully justified in expecting total compliance by the states.

As further evidence that the Secretary's actions are indeed the cause of the injury to plaintiffs, the State has cross-claimed against the Secretary requesting the court to countermand the Directive. In that cross-claim, the State alleges that it interprets § 3309(b) differently from the Secretary, and that it agrees with plaintiffs' contention that employees of church schools should be exempt. The State further alleges that:

> pursuant to sections 3304(a)(6), 3304(c) and 3309 of the Federal Act, cross-claimants must substantially comply, and are now complying, with the Secretary's interpretation as to which services under such section 3309 must be covered by California for unemployment insurance, and which services may be permissibly excluded by California from unemployment insurance coverage.

Under these circumstances the position that the harm alleged by p' ntiffs is the consequence of the State's actions and not those of the Secretary is wholly unrealistic.[8]

B. Propriety of Injunctive Relief

The standard for granting injunctive relief in the Ninth Circuit was set forth in *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 526 F.2d 86,

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[8] On January 18, 1979, Judge Leroy J. Contie of the United States District Court, Northern District of Ohio, issued a memorandum opinion denying standing to sue the Secretary of Labor in a case virtually identical to the present one. *St. John Lutheran Church, Inc. v. Giles*, 78-1516 (N.D. Ohio, filed January 18, 1979). The opinion stated:

> [t]he Secretary has no power to compel the state to comply with the requirements for certification. An order against the Secretary could not redress the plaintiff's alleged injury because the Secretary has no power to change the state laws of which plaintiff complains. Therefore the plaintiff has no standing to assert a claim against the Secretary, and the Secretary must be dismissed from the action.

Memorandum Opinion at 2-3.

Judge Contie's restrictive analysis of the standing requirements seems contrary to that of the Supreme Court in *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974). There the Court found Article III standing on the basis that the State of New Jersey adversely affected the interests of employers engaged in collective bargaining by offering public assistance to striking workers. Clearly New Jersey could not, by providing or withholding assistance, force or restrain employees from engaging in strike activity. Nevertheless, the Court held there was standing since New Jersey's policy "by its continuing and brooding presence, [cast] what may well be a substantial adverse effect on the interests of the petitioning parties." *Id.* at 122. Here, although the Secretary cannot directly alter state law, the "brooding presence" of possible decertification is capable of constraining state compliance, with substantially adverse effects on the plaintiffs.

88 (9th Cir. 1975) quoting from *Charlie's Girls, Inc. v. Revlon, Inc.* 483 F.2d 953, 954 (2d Cir. 1973):

> One moving for a preliminary injunction assumes the burden of demonstrating *either* a combination of probable success and the possibility of irreparable injury *or* that serious questions are raised and the balance of hardships tips sharply in his favor. [Emphasis original.]

Plaintiffs have met not only the second, more flexible test for granting preliminary injunctive relief, but the first, more stringent test as well.

1. Likelihood of Success on the Merits

a. *Meaning of Statute*

As stated above, the Secretary interpreted the 1976 amendment of § 3309 as eliminating the heretofore accepted exclusion for employees of primary and secondary schools operated by churches. However, § 3309(b)(1) exempts those "in the employ of (A) a church . . . or (B) an organization which is operated primarily for religious purposes and which is operated . . . by a church." The employees in these cases clearly appear to fall within category 1(A) of this Section. However, the Secretary appears to argue that they are not entitled to exemption under § 3309 because they fail to meet the additional requirements of Subsection 1(B) in that the religious schools are not, in his view, operated "primarily for religious purposes."

The simple answer to the Secretary's argument is that the two subsections are disjunctive and compliance with Subsection 1(A) above is sufficient to warrant exemption. The legislative history of § 3309 tends to support the view that religious schools such as the ones

here in question which are not separately incorporated, need not meet the standards of Subsection 1(B) in order to insure exempt status.

> This paragraph excludes services of persons where the employer is a church or convention or association of churches, but does not exclude certain services performed for an organization which may be religious in orientation unless it is operated primarily for religious purposes and is operated, supervised, controlled, or principally supported by a church (or convention or association of churches). *Thus, the services of the janitor for a separately incorporated college, although it may be church related, would be covered.* A college devoted primarily to preparing students for the ministry would be exempt, as would a novitiate or a house of study training candidates to become members of religious orders. On the other hand, a church related (*separately incorporated*) charitable organization (such as, for example, an orphanage or a home for the aged) would not be considered under this paragraph to be operated primarily for religious purposes.

H.R. Rep. No. 612, 91st Cong., 1st Sess. 44 (1969) [Emphasis added].

This quote indicates that Congress intended the tax to be applicable to the services of employees of *separately incorporated* organizations, but not to church operations run directly by the church with its own employees. Thus, it is reasonable to infer that Congress did not intend to include church schools within the scope of unemployment compensation.

b. *Unconstitutional Entanglement*

It is well established that a statute should, if possible, be construed to avoid constitutional infirmities. *See*,

e.g., *United States v. Vuitch*, 402 U.S. 62, 70 (1971). The Secretary argues that his interpretation of § 3309(b) does not violate the establishment clause of the First Amendment because taxing a church could in no way be considered "establishment" of religion. Further, there could be no violation of the free exercise clause because although the tax might put some financial burden on the free exercise of religion (*e.g.*, inhibiting a church from firing an employee on religious grounds for fear of having to pay unemployment compensation), this burden is minimal and not *per se* unconstitutional.

However, as stated in *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970):

> [d]etermining that the legislative purpose . . . is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result—the effect—is not an excessive government entanglement with religion.

Excessive government entanglement, in and of itself, will result in a violation of the constitutional protections against establishment and the inhibition of free exercise.[9] *See Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971); *NLRB v. Catholic Bishop*, 47 U.S.L.W. 4283 at 4287 (March 20, 1979).

The entanglement resulting from the Secretary's in-

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[9] Although much of the law relating to excessive entanglement is in the context of government support to religious schools, the Supreme Court has made it clear that "[t]he hazards of churches supporting government are hardly less in their potential than the hazards of government supporting churches; each relationship carries some involvement rather than the desired insulation and separation." [Footnote omitted.] *Walz*, 397 U.S. at 675. *See also Catholic Bishop*, 47 U.S.L.W. at 4286-87.

terpretation stems from the requirement that with respect to these church schools, the states must determine who is subject to the unemployment compensation tax and who is not. In the Directive, states are advised that:

> [i]f an employee performs both non-exempt and exempt services during a single employment period, as in the case of services performed for a church-related school and an organization exempted by section 3309(b)(1), and "if the services performed during one-half or more of any pay period by an employee for the person employing him constitute employment, all the services of such employees [*sic*] for such period shall be deemed to be employment, but if the services performed during more than one-half of any such pay period by an employee for the person employing him do not constitute employment, then none of the services of such employee for such period shall be deemed to be employment," as provided in Section 3306(d), FUTA.

Thus, the State is required to make the determination whether, during any given pay period, an employee has spent more than one-half of his time on purely religious activities. If so, that employee is exempt.

The potential for excessive entanglement in making these decisions is manifest. That religious teaching permeates the curriculum of private religious schools has been clearly acknowledged by the Supreme Court of the United States:

> "The analysis of the constitutional objections to these two state systems of grants to parochial or sectarian schools must start with the admitted and obvious fact that the *raison d'etre* of parochial schools is the propagation of a religious faith."

Lemon, 403 U.S. at 628 (Douglas, J., concurring.)

Based on its recognition of this permeation, the Court in *Lemon* found the provision of economic support to religious schools to be a potential violation of the establishment clause, even when such support was restricted to supplementing salaries of teachers of purely secular subjects. It is clear that in cases such as *Lemon*, the concern is not only that some of the supported teachers might in fact teach religious doctrine, but more significantly, that entanglement between church and state will necessarily occur when steps are taken to insure that teachers do not engage in religious teaching.

In this case, as in *Lemon*, the inquiry necessarily involved in policing the application of the exemption, "puts a public investigator into every classroom and entails a pervasive monitoring of these church agencies by the secular authorities." *Lemon*, supra at 627 (Douglas, J., concurring). Yet without such monitoring, there would be no way of making the determinations required by the Secretary's interpretation of § 3309. As stated in *Catholic Bishop* "[i]t is not only the conclusions that may be reached . . . which may impinge on rights guaranteed by the Religion Clauses, but the very process of inquiry leading to findings and conclusions." 47 U.S.L.W. at 4286-87.

The religious schools in this case argue that all of their courses of study are designed to advance their religious principles. Thus, in order to enforce the tax, it will be necessary for the EDD to determine as to each employee whether their activities are "purely religious" more than one-half of the time. That controversies will arise, for example, as to whether in a world history class

the teacher spends more than one-half of any given session teaching purely "religious" or purely "secular" history can hardly be subject to doubt.[10] And disputes unquestionably will arise in situations where employees are dismissed for cause and the reason given by the church school is failure to adhere to religious tenets of the church.

The type of inquiry necessary to the resolution of controversies such as these is almost identical to that which the Court found to involve dangers of excessive entanglement in *Catholic Bishop*. There, the question was whether a particular action was an unfair labor practice. The resolution of such a charge "in many instances, [would] necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission." 47 U.S.L.W. at 4286. Such an inquiry, taken by itself, involves impermissible entanglement of the state with the church, violative of the separation of those entities mandated by the Constitution.

2. Possible Irreparable Injury

Plaintiffs have met their burden of showing that they are likely to suffer irreparable injury if an injunction is not issued against collection of the unemployment compensation tax. Plaintiffs have submitted a number of affidavits showing that inquiries into the religious con-

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[10] Plaintiffs, of course, argue that such a determination is impossible to make since they teach all subjects, including history, from a religious perspective. While some events in history may be less amenable to such an approach, e.g., the Civil War, it would seem that much Middle Eastern and European history might well be taught differently if viewed from a strictly religious perspective.

tent of a teacher's activities have already been made by the EDD. For example, on February 27, 1979, the Pilgrim Lutheran Church was required by the EDD to answer a series of questions with respect to thirty-six employees on the church's payroll ledger. Among these questions were the following:

"What services were performed by each individual?"

"Where were the services performed?"

"If performed for both the school and church, what was the percentage for each?"

The church was also asked to identify any "licensed, ordained or commissioned minister(s) among the employees"; to describe the procedures necessary to become a minister; to specify whether the services performed by a minister constitute "the conduct of religious worship or the ministration of sacerdotal functions"; and to state whether the services are "performed pursuant to an assignment or designation by his ecclesiastical superiors." Such inquiry is far more intrusive than that directed to Monsignor O'Donnell which is attached as an appendix to *Catholic Bishop* for the purpose of illustrating how entanglement can result from the "very process of inquiry." The declarations here are replete with examples of inquiry by the State auditors into the religious qualifications of the teachers employed, the content of the subjects taught, and the extent to which the teachers are involved in activities other than teaching. Clearly the unconstitutional entanglement which, even in situations where it is only potential, can invalidate a

statute, is occurring on a regular basis at the present time.[11]

It has been held that the deprivation of fundamental constitutional rights constitutes irreparable injury. *Lewis v. Kugler*, 446 F.2d 1343, 1350 (3rd Cir. 1971); *Schnell v. City of Chicago*, 407 F.2d 1084, 1086 (7th Cir. 1969); *Green v. Kennedy*, 309 F. Supp. 1127, 1139 (D.D.C. 1970), *appeal dismissed* 398 U.S. 956 (1970); *Fortune Society v. McGinnis*, 319 F. Supp. 901, 903 (S.D.N.Y. 1970). In particular, a violation of the establishment clause has been the basis of the issuance of an injunction. *Public Funds for Public Schools v. Marburger*, 358 F. Supp. 29 (D.N.J. 1973), *aff'd*, 417 U.S. 961 (1974). Here, plaintiffs have shown not only potential, but actual violation of the Religion Clauses.

3. Jurisdiction to Grant Relief Requested

The Secretary has argued that even if there were a constitutional violation in the enforcement of § 3309 as interpreted, this court lacks subject matter jurisdiction to grant either injunctive or declaratory relief. The Secretary relies on 28 U.S.C. § 1341 which provides:

The district courts shall not enjoin, suspend or rest-

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[11] One declaration details the visit of an auditor to a preschool. The auditor, after asking detailed questions as to what transpired in the music class, the "nature center" and the "block center," ended by classifying music as strictly religious and the nature and block centers as both religious and secular. There is even a list of exempt employees which was given to one of the church schools at the conclusion of an audit. Among those listed was the church custodian "that % that applies to church (if % is greater for school than 100% salary is taxable)." One wonders how the auditor will determine the percentage of the custodian's time spent on the church versus the church school since the same buildings are frequently used for both purposes.

> rain the assessment, levy or collection of any tax under State law where a *plain, speedy and efficient remedy may be had in the courts of such State.* [Emphasis added]

As concluded above, the facts of this case justify the issuance of an injunction to prevent the collection of the unemployment tax. However, it appears that this remedy is not available in the state court. Article XIII, section 32 of the Constitution of the State of California provides:

> No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax.

Similarly, California's Unemployment Insurance Code § 1851 provides:

> No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding, in any court against this State or against any officer thereof to prevent or enjoin the collection of any contribution sought to be collected under this division.

Thus, the availability of injunctive relief in State court is, at best, uncertain.[12]

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[12] There is some California authority for the proposition that the anti-injunction statute and the constitutional mandate may have some exceptions where a challenge is made to a tax law on the ground that it is unconstitutional. *See, e.g., McKay Jewelers, Inc. v. Bowron*, 19 Cal. 2d 595, 122 P.2d 543 (1942); *Bueneman v. City of Santa Barbara*, 8 Cal. 2d 405, 65 P.2d 884 (1937); *Las Animas & San Joaquin Preciado*, 167 Cal. 580, 140 P.239 (1914). However, this authority is neither compelling nor recent. It is thus not established that plaintiffs would not be barred by the anti-injunction provisions cited should they seek an injunction in state court.

However, the Secretary correctly points out that the state remedy need not be as effective as the federal remedy, so long as it is plain, speedy and efficient. *Mandel v. Hutchinson*, 494 F.2d 364, 367 (9th Cir. 1974). The Secretary maintains that the declaratory remedies available in state court or the administrative remedies which might be available to plaintiffs are adequate, even if plaintiffs are required to pay the tax and later sue for refund. *See Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943); *Matthews v. Rogers*, 284 U.S. 521, (1932). This is true even when a constitutional violation is alleged. *King v. Sloane*, 545 F.2d 7, 8 (6th Cir. 1976); *Mandel*, 494 F.2d at 366-367; *Bland v. McHann*, 463 F.2d 21 (5th Cir. 1972), *cert. denied* 410 U.S. 966 (1973); *Helmsley v. City of Detroit*, 320 F.2d 476, 478-79 (6th Cir. 1963).

However, the present case is distinguishable from those cited above. Plaintiffs here claim not merely that the tax unconstitutionally deprives them of their property, as was the claim in all of these cases; rather, plaintiffs are claiming that the very process of determining whether any tax is due at all results in a violation of their First Amendment rights. Such violation cannot be remedied by a return of the tax paid if the statute is eventually found to be unconstitutional in state court.

The distinction between a deprivation of property rights as opposed to personal liberty as a basis for granting injunctive relief is discussed in *Gray v. Morgan*, 371 F.2d 172 (7th Cir. 1966), *cert. denied* 386 U.S. 1033 (1967). In that case, the court grappled with the problem of whether a claimed constitutional violation could in fact overcome "both the force of 28 U.S.C. § 1341 (as to fed-

eral injunctions against enforcement of state tax laws) and the reasons for federal restraint (as to federal declaratory judgments or judgments for tax refunds)." *Id.* at 174. The court concluded that if the alleged constitutional violation is of personal, rather than property rights, such a claim could prevail over the proscriptions of § 1341. *Id.* at 175.[13]

Even in a case where the harm to personal rights did not rise to the level of the First Amendment claim, it has been held that an injunction is appropriate where the process of collecting the tax would result in irreparable injury. In *United States Steel Corp. v. Multistate Tax Commission*, 367 F. Supp. 107 (S.D.N.Y. 1973), plaintiffs were required by a state taxing statute to turn over their books and records to persons whose authority and qualifications they claimed were invalid. The court granted an injunction against the collection of the state tax, rejecting the proposition that the plaintiffs could pay the tax and sue for refund in state court. The court noted that this remedy had an infirmity since, "because it is unavailable to plaintiffs until after the audits have been conducted, it might cause plaintiffs irreparable injury . . . In cases where irreparable injury would occur if no injunction were to be granted, federal courts will entertain suit." *Id* at 116. As discussed above, a violation

[13] In holding that injunctive relief should not be granted, the court noted that "[i]n the instant case, we have no claim of the denial of procedural due process. Plaintiffs do not complain of the tax itself." These plaintiffs complain both of the tax *and* the process. The court relied heavily in its analysis on a scholarly district court opinion, *Abernathy v. Carpenter*, 208 F. Supp. 793 (W.D. Mo. 1962), *aff'd per curiam*, 373 U.S. 241 (1963), which contains an excellent discussion of the concerns relevant to the granting of such an injunction.

of the establishment clause constitutes irreparable injury, and this injury cannot be avoided without the issuance of an injunction against the collection of the tax.[14]

Furthermore, the granting of the injunction in this case would not be contrary to any of the policy considerations which underlie the anti-injunction statute. As stated in *Matthews v. Rodgers*, 284 U.S. 521 at 525 (1932):

> The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it.

Here, the concern over federalism is not compelling since an interpretation of a federal statute is being imposed by the Secretary upon the State. In fact, the State has represented that it disagrees with the Secretary's interpretation and has itself petitioned this court to resolve the present dispute. It is difficult to characterize the posture of the State in the present litigation as in any sense "independent." Thus, the injunction, if granted, would not interfere with the State's autonomy.

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[14] In a recent district court case, *Independent Baptist Church v. State of Tennessee*, No. 1-78-194 (D. Tenn., filed Nov. 21, 1978), involving identical issues, the court dismissed the action on the basis that the plaintiff's state remedy of suing for refund was adequate, even though no injunction was available in state court. The opinion states that "[t]he situation of the plaintiffs . . . does not appear substantially different from the situation of any other individual contending that a tax is unconstitutional." *Id.* at 5. However, the court did not address itself to the point raised here, that the collection procedure itself violates the constitution. Presumably, this argument was not raised before that court.

C. Motion to Dismiss Cross-Claim

The State has cross-claimed against the Secretary challenging the constitutionality of the Directive. However, the State has available to it an administrative remedy by which it can raise such a challenge. This administrative procedure is detailed in 26 U.S.C. 3304(c), 3310. Since the State has not exhausted its administrative remedies, its cross-claim against the Secretary must be dismissed. *See McKart v. United States*, 395 U.S. 185, 193 (1969); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 36, 51 (1938).

III
CONCLUSION

The plaintiffs are entitled to a preliminary injunction against the State and the EDD to restrain collection of unemployment and liability tax[15] with respect to their employees. The Secretary has represented to this court that he will not decertify the States's program if the State is out of conformity due to an injunction issued by this court. Thus, no separate injunction is necessary as to him at this time.

The motion of the Secretary to be dismissed for lack of standing is denied, however, the Secretary's motion to dismiss the State's cross-claim is granted.

DATED: September 21, 1979

/s/ MARIANA R. PFAELZER
MARIANA R. PFAELZER
United States District Judge

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[15] Under *Cal. Unemp. Ins. Code* § 2606 (West 1972), covered services for disability insurance purposes are the same as covered services for unemployment insurance. The basis for granting injunctive relief against the collection of the disability tax is thus the same as for enjoining collection of the unemployment tax.

Appendix M

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Charlotte Division

C-C-79-206

ASCENSION LUTHERAN CHURCH, ST. STEPHEN'S LUTHERAN CHURCH, ST. JOHN'S EVANGELICAL LUTHERAN CHURCH, AND EMMANUEL LUTHERAN CHURCH,

Plaintiffs,

VERSUS

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, AND F. RAY MARSHALL, UNITED STATES SECRETARY OF LABOR,

Defendants.

ORDER

Before James B. McMillan, District Judge

Plaintiffs, four Missouri Synod Lutheran churches which operate elementary schools, brought this action in Mecklenburg County Superior Court, protesting the inclusion of their schools' employees in the North Carolina unemployment compensation program. All plaintiffs seek a declaration that the Employment Security Law, Chapter 96 of the North Carolina General Statutes, does not apply to them. Three plaintiffs seek a refund of con-

tributions they have made under the statute. (The fourth plaintiff, St. Stephen's Lutheran Church, has paid no contributions and thus seeks only declaratory relief.)

The North Carolina Employment Security Commission, the only defendant in the original complaint, removed the case to the United States District Court for the Western District of North Carolina on July 11, 1979, and added the United States Secretary of Labor, F. Ray Marshall, as a defendant. The matter is now before the court on plaintiffs' motion for summary judgment and several motions by defendants. Those motions include (1) the Secretary's motions (a) for dismissal, (b) for dismissal of the entire case, (c) for judgment on the pleadings, and (2) the Employment Security Commission's motions (a) for a stay and (b) for summary judgment. These motions were heard on August 28, 1980. As suggested by the court on that date, plaintiffs subsequently have filed a motion to remand the case to state court, pursuant to 28 U.S.C. §1447(c).

I. *Facts*

North Carolina's Employment Security Law, N.C.G.S. §96-1 *et seq.*, was enacted in 1936 pursuant to Title IX of the Social Security Act of 1935, forerunner of the Federal Unemployment Tax Act, now codified at 26 U.S.C. §3301 *et seq.* ("FUTA"), which was enacted during the depression of the 1930's to avert disastrous consequences of unemployment. FUTA establishes a system of financial incentives through which states are encouraged—but not required—to adopt unemployment compensation laws that parallel the FUTA system. Though participation in the federal program is entirely voluntary, *Carmichael v. Southern Coal Co.*, 301 U.S.

495, 525-26 (1937), the states have found it necessary as a practical matter to participate in the federal program.

North Carolina has participated in the federal program for more than forty years by collecting a state unemployment tax and remitting the tax revenues to the federal government. The state in turn requests funds from the federal government to pay unemployment claims, and the federal government, through the Department of Labor, then returns the state revenues along with a federal subsidy. In order to remain eligible for the federal program, the state must comply with the standards set out in FUTA as enforced by the Department of Labor. *See* Affidavit of Warren G. Witmer, Secretary of N. C. Employment Security Commission. *See also* N. C. Employment Security Law, N.C.G.S. §96-1 *et seq.*

Until 1970, FUTA and the North Carolina Employment Security Law excluded nonprofit employers from their coverage. In 1970, Congress amended the act to require inclusion of individuals employed by nonprofit organizations. The amendments, however, created several exceptions, including work performed in nonprofit elementary and secondary schools.

In 1976, Congress enacted the Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, 90 Stat. 2667. Those amendments left intact an exclusion from FUTA's coverage for any services performed

> "(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches. . . ."

26 U.S.C. §3309(b)(1). Nevertheless, the amendments specifically eliminated the exclusion previously in effect for service performed "in the employ of a school which is not an institution of higher education." 84 Stat. 697-98, formerly codified at 26 U.S.C. §3309(b)(3) (1970).

In response to the 1976 FUTA amendments, North Carolina changed its Employment Security Law, effective January 1, 1978, to mirror the federal amendments. That North Carolina law, N.C.G.S. §96-8(6)k. 15, excludes from coverage

> "[s]ervices performed (i) in the employ of a church or convention or association of churches, or an *organization which is operated primarily for religious purposes* and which is operated, supervised, controlled or principally supported by a church or convention or association of churches; or (ii) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order. . . ." [Emphasis added.]

North Carolina discontinued its exemption of nonprofit elementary and secondary schools from its unemployment compensation program, N.C.G.S. §§96-8(5)q, 96-8(6)j. Representatives of the Employment Security Commission interpreted these amendments to require participation of *all* nonprofit elementary and secondary schools.

The congressional legislative history supports Secretary Marshall's interpretation that church-related schools were to be covered by the act. *See, e.g.*, S. Rep. No. 1265, 94th Cong., 2d Sess. 8 (1976). That Senate report estimates that repeal of the exception for nonprofit schools would permit the inclusion under FUTA of

242,000 new employees, a figure which approximates the total number of teachers in *all* non-profit elementary and secondary schools.

Though no such legislative history is available for North Carolina, it is unlikely that the state intended to deviate from the application of the federal statute. Moreover, few nonprofit schools in the state are not church-related.

Secretary Marshall in 1978 issued a letter and later the Department of Labor issued a directive which stated that "[t]he exclusion in section 3309(b)(1)(A) relating to church employees has no other application to activities performed in elementary and secondary schools *since the schools are not churches within the meaning of that section.*" The directive stated further that the exclusion in section 3309(b)(1)(B) does "not apply to institutions where the employees of the institution are *primarily engaged in educational activities at the elementary and secondary school level.*" U.S. Department of Labor Directive to State Employment Security Agencies, May 30, 1978 (emphasis added). Marshall reasonably maintained that Congress, by enacting the amendments, intended that FUTA should apply to all nonprofit elementary and secondary schools, including the church-related schools which comprise most of the country's nonprofit schools.

Plaintiffs' schools were taxed under the revised act. All plaintiffs but one paid the tax under protest with a demand for a refund. *See* Affidavit of Warren G. Witmer, Secretary of Employment Security Commission. The Employment Security Commission denied the re-

fund, and plaintiffs brought this action in state court pursuant to N.C.G.S. §96-10(f).

II. *Discussion*

A. *North Carolina's Employment Security Law does apply to church-related schools.*—The above history makes it obvious that the North Carolina law does require employment security contributions from church-related schools, and that they are obligated to pay the appropriate taxes. In brief recap, this conclusion is supported by (1) testimony of both Secretary Marshall and North Carolina Employment Security Commission Secretary Witmer; (2) the text of the 1970 amendments; (3) by the 1976 amendment which removed the exclusion previously in effect for nonprofit elementary and secondary schools; (4) by the North Carolina amendment to its Employment Security Law to reflect the same change, *see* N.C.G.S. §§96-8(5)q, 96-8(6)j and 96-8(6)k.

B. *Application of the statute to church-related schools does not violate the free exercise and establishment clauses of the First Amendment to the United States Constitution.*—Defendants in applying the statute have not attempted to impede the observance of a religion or discriminate among religions, results which are necessary if a violation of the free exercise clause is to be found. *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961). Plaintiffs have not shown that requiring them to participate in the unemployment compensation program unduly burdens their right freely to exercise their beliefs. The state requires only that church-related schools submit certain records to the state and that they pay

taxes to the Employment Security Commission *or* reimburse eligible former employees on an individual basis. N.C.G.S. §96-9(d). The First Amendment does not invalidate a law merely because it imposes a financial burden on a person's practice of his or her religious beliefs. *Braunfeld v. Brown, supra,* at 607. Plaintiffs here have made no showing that participation in the state's unemployment program would burden them any more than requiring their schools to make contributions to the program; requiring such contributions is hardly a burden which interferes with the practice of religious beliefs.

Requiring participation in the unemployment compensation program does not effect excessive entanglement by the state in religious affairs nor encourage certain religious activities over others, in violation of the First Amendment's establishment clause. The state has no intent to meddle in religious affairs. It simply intends to provide a system of compensation for employees of church-related schools who lose their jobs. The unemployment compensation system affects only those schools which discharge employees, and it treats all schools equally, discriminating neither among religions nor between secular and sectarian schools. Indeeed, the only reported case in which a court reaches the merits of similar First Amendment claims holds that South Dakota's unemployment compensation statute, based on FUTA, does not create excessive government entanglement with religion. *In re Unemployment Insurance Coverage of Northwestern Lutheran Academy,* 290 N.W.2d 845 (S.D. 1980), *cert. pending,* 49 U.S.L.W. 3043 (July 25, 1980).

Plaintiffs have not shown that North Carolina's

Employment Security Law does not apply to their elementary and secondary schools, nor have they shown that the state law violates their First Amendment rights. Plaintiffs' motion for summary judgment is therefore denied, and plaintiffs are authorized to proceed to trial in state court.

C. *Defendant Secretary Marshall's Motion to Dismiss should be allowed.*—Defendant Marshall moves to dismiss any claims against him by plaintiffs on the ground that plaintiffs do not satisfy the minimal constitutional standing requirement to bring suit against him. (Although plaintiffs did not name Marshall as a defendant in their complaint, defendant Employment Security Commission moved to join Marshall as a defendant, and the court without opposition granted the motion joining him as a necessary party on September 27, 1979.)

Plaintiffs have standing to sue defendant Marshall only if "the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976). Plaintiffs have not sought to make such a showing. Defendant Employment Security Commission sought to add Marshall as a defendant because Marshall was arguably a necessary party to this action due to the persuasive effect of the federal financial incentives on North Carolina's employment security legislation and policies. The Department of Labor administers FUTA and certifies only those states which comply with federal statutes and regulations to receive federal subsidies.

No party has shown that defendant Marshall's presence in this suit is necessary to afford the requested

relief. Although North Carolina's Employment Security Law is based upon the federal statute, with which it must comply to qualify the state for the federal subsidy, the North Carolina statute is a *state* law which is separate and independent from direct federal control. The Department of Labor attempts to insure that *participating* states comply with statutory requirements, but it cannot force any state to participate. Defendant Marshall thus cannot grant plaintiffs any of the relief they seek. Defendant Employment Security Commission may have intended to set forth a claim against the Secretary of Labor, but it has not done so. The action as to defendant Marshall is therefore dismissed.

D. *Plaintiffs' Motion to Remand to State Court.* —With Secretary Marshall out of the case, there is no reason to keep this action in federal court because this court does not have jurisdiction to award plaintiffs any of the relief they seek. Plaintiffs initially brought this action in state court; a state court is the proper forum to dispose of the claims because the federal Tax Injunction Act, 28 U.S.C. §1341, prohibits this court from granting the relief sought by plaintiffs.

The Tax Injunction Act provides:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

28 U.S.C. §1341.

Although plaintiffs seek a declaratory judgment and recoupment of taxes already paid, rather than an injunction, the statute as interpreted also bars the court from granting such relief. A declaratory judgment that the

Employment Security Law does not apply to church-related schools or is invalid if applied to them would effectively prevent collection of further unemployment taxes from them. Federal courts, moreover, have long adhered to a policy that they "refrain from enjoining the collection of allegedly unlawful state taxes [which] should likewise govern the exercise of their discretion in withholding [declaratory relief]." *Hillsborough v. Cromwell*, 326 U.S. 620, 623 (1946). In the only reported case on this issue, the district court for the Eastern District of Tennessee dismissed a complaint brought by two Baptist churches for injunctive and declaratory relief. *Independent Baptist Church of Red Bank v. Tennessee*, 468 F.Supp. 71 (E.D. Tenn. 1978). That court held that the Tax Injunction Act prohibited it from granting plaintiffs relief from the enforcement of Tennessee's employment security law, and it found that "a declaratory judgment on the plaintiffs' rights under the state and federal statutes would be inappropriate" because "the policy behind refusing to grant an injunction in a tax assessment case is undermined when the Court declares the rights of the parties." *Id.* at 76.

The Tax Injunction Act also prohibits plaintiffs from recovering taxes they have already paid, for section 1341 "applies to suits for refunds, as well as to anticipatory relief." *Kelly v. Springett*, 527 F.2d 1090, 1094 (9th Cir. 1975).

North Carolina has provided an adequate remedy in its state courts if the Employment Security Commission refuses to refund the unemployment taxes requested by three of these plaintiffs. The three plaintiffs, at least, are entitled to sue the Employment Security Commission in

state superior court, pursuant to N.C.G.S. §96-10(f), as they originally did in this case.

Although plaintiffs' claims for relief are dubious, plaintiffs deserve the opportunity to bring their action in a forum which is theoretically capable of granting the desired relief. The Tax Injunction Act would preclude this court from granting such relief, even if plaintiffs could show they had a valid claim.

IT IS THEREFORE ORDERED:

1. That plaintiffs' motion for summary judgment is denied.

2. That the suit as to defendant Marshall is dismissed.

3. That this case is remanded, pursuant to 28 U.S.C. §1447(c), to the Superior Court for Mecklenburg County, North Carolina, for further proceedings.

This 20th day of October, 1980.

/s/ JAMES B. McMILLAN
JAMES B. McMILLAN
United States District Judge

Appendix N

In the

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-120

ST. MARTIN EVANGELICAL LUTHERAN CHURCH AND NORTHWESTERN LUTHERAN ACADEMY,
Petitioners

VERSUS

STATE OF SOUTH DAKOTA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

QUESTIONS PRESENTED

1. Whether the Federal Unemployment Tax Act requires participating state unemployment compensation programs to cover employees of parochial elementary and secondary schools.

2. Whether coverage of employees of parochial elementary and secondary schools in an unemployment compensation program violates the First Amendment.

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INTEREST OF THE UNITED STATES

The Federal Unemployment Tax Act ("FUTA"), 26 U.S.C. 3301 *et seq.*, and related federal laws authorize grants of federal funds to qualifying states for the administration of state unemployment compensation and employment service programs and provide federal tax credits for employers operating within such states. A state qualifies for these benefits within a given taxable year only if the Secretary of Labor certifies on October 31 of that year that the state's unemployment compensation program conforms to the requirements of FUTA. 26 U.S.C. 3304(c).

The decision of the Supreme Court of South Dakota in this case holds that FUTA requires the states, as a condition of certification, to include parochial elementary and secondary schools within the coverage of their unemployment compensation programs. This interpretation accords with that of the Secretary of Labor. Other courts, however, have ruled that FUTA does not require the coverage of such schools and that the statutes of certain states do not cover them. Because of the Secretary's responsibility under the statute to make annual certification decisions, the United States has a strong interest in obtaining a definitive interpretation of the requirements of FUTA.

STATEMENT

Petitioners are members of the Wisconsin Evangelical Lutheran Synod, which operates state-certified parochial schools within the State of South Dakota. Petitioner St. Martin Evangelical Lutheran Church operates an elementary school offering instruction to pupils from

kindergarten through the eighth grade (Pet. App. A-38). Petitioner Northwestern Lutheran Academy is a secondary school providing instruction in grades nine through twelve (*id.* at A-39). The Academy is designed to provide education to persons who intend to enter the Synod's preaching and teaching ministries as well as to provide a general Christian secondary education to students. Approximatley 50% of the students who enter the Academy do not plan to become teachers or pastors (*id.* at A-40).

The issue in this case concerns the proper interpretation of the Federal Unemployment Tax Act (FUTA), 26 U.S.C. 3301 *et seq.*, and its implementation through the South Dakota Unemployment Insurance Law, Title 61 of the South Dakota Codified Laws Ann. (1978). These laws are part of the federal-state unemployment compensation system. Under this system, the United States provides grants to state employment agencies and tax credits to employers in states that have adopted unemployment compensation laws that conform to federal standards set forth in FUTA. See also 29 U.S.C. 49d; 42 U.S.C. 501. All 50 states participate in this system. A state is eligible for these benefits only if the Secretary of Labor certifies on October 31 of each year that the state's program conforms with the requirements of FUTA. 26 U.S.C. 3304(c).

Prior to 1976, FUTA permitted qualifying states to exempt from their programs certain types of employment by non-profit institutions, including services performed:

> (1) in the employ of (A) a church or convention or association of churches, or (B) an organization which

is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;

(2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;

(3) in the employ of a school which is not an institution of higher education.

26 U.S.C. (1970 ed.) 3309(b). The South Dakota unemployment compensation law contained the same exemptions in almost identical language. In 1976, Congress amended FUTA and repealed the third exemption relating to elementary and secondary schools. Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, Section 115, 90 Stat., 2670. Thereafter South Dakota amended its own statute to eliminate the third exemption relating to elementary and secondary schools beginning January 1, 1978, the effective date of the 1976 FUTA amendments. See S.D. Codified Laws Ann. §61-1-10.4(3) (1978).

The Secretary of Labor has determined that the 1976 amendment to FUTA require that the statutes of qualifying states cover parochial school employees. This determination was communicated in a letter to the Most Reverend Thomas C. Kelley, General Secretary of the United States Catholic Conference (Pet. App. A-4). In May 1978, the South Dakota Department of Labor notified petitioners that the services provided in their schools constituted covered employment subject to the South Dakota Unemployment Insurance Law and therefore that their employees were covered under the state

unemployment compensation program. Petitioners took an administrative appeal of this determination and a hearing was held before an Appeals Referee for the South Dakota Department of Labor. The referee ruled that the schools were subject to coverage under the statute, but ruled that pastors and male teachers were exempt from coverage under the second exemption for ministers of a church (*id.* at A-35 to A-45). See S.D. Codified Laws Ann. §61-1-10.4(2) (1978); 26 U.S.C. 3309(b)(2).

Petitioners sought review of the referee's decision in the South Dakota Circuit Court for the Sixth Judicial Circuit. The circuit court reversed the referee's decision and held that the schools were exempt under the first exemption of the statute (Pet. App. A-25 to A-34). The State appealed, and the South Dakota Supreme Court reversed and remanded with instructions to reinstate the referee's decision (*id.* at A-1 to A-24). The court examined the legislative history of FUTA and concluded that Congress intended to remove the exemption of parochial school employees when it amended the statute in 1976 (*id.* at A-5 to A-9). Accordingly, it held that petitioners' school employees were subject to unemployment coverage. The court further held that the statute, as thus construed, does not violate the First Amendment, noting that it does not conflict with any element of petitioners' religious beliefs and practices and does not foster excessive entanglement between church and state (*id.* at A-9 to A-16).

DISCUSSION

The United States believes that the Supreme Court of South Dakota correctly interpreted FUTA to require

that parochial school employees be covered by the unemployment compensation laws of qualifying states. The United States also believes that the court below was correct in upholding the constitutionality of this coverage. However, because of the importance of the questions presented in this case and because of the conflict in interpreting FUTA between the Supreme Court of South Dakota and decisions of the United States Court of Appeals for the Fifth Circuit and the Supreme Court of North Dakota, we submit that the decision below warrants review by this Court.

In *Grace Lutheran Church v. North Dakota Employment Security Bureau*, Civ. No. 9719 (June 20, 1980) (Pet. App. A-46 to A-61), the North Dakota Supreme Court held that Section 3309 of FUTA and its "mirror image" (*id.* at A-49) in the North Dakota statute continue to exempt parochial schools from their coverage despite the deletion of the third exemption pursuant to the 1976 amendments. In *States of Alabama and Nevada v. Marshall*, 626 F.2d 366 (1980) (Pet. Supp. App. A-1 to A-6), the Fifth Circuit recently was presented with an appeal from a decision by the Secretary of Labor to deny certification to the States of Alabama and Nevada as a result of the determination by those states that parochial schools were exempt from coverage under their unemployment compensation statutes. The court of appeals held that FUTA continues to exempt parochial schools and set aside the Secretary's decision.

It is important that this conflict over the interpretation of FUTA be resolved expeditiously. The entitlement of thousands of parochial school employees to unemployment compensation, which this Court has noted

may be necessary to maintain a newly unemployed worker at subsistence levels (*California Dep't of Human Resources Development v. Java*, 402 U.S. 121, 131-132 (1971), turns upon the proper construction of the statute.[1] The present controversy, however, has broader ramifications that transcend this particular group of employees. FUTA is the heart of the entire federal-state unemployment compensation system. One of the essential elements of that system is uniform application of federal law from state to state, as embodied in the certification of state systems by the Secretary. With the present uncertainty in the proper application of FUTA, conformity determinations by the Secretary, with their attendant consequences for grants to state agencies and tax credits to employers, may vary from state to state depending upon the judicial interpretation of FUTA in effect in a particular state. Thus, the continuing litigation and conflicting results concerning FUTA's coverage pose a serious hindrance to the effective and uniform administration of the nation's unemployment system that can be resolved only by a definitive interpretation of FUTA.

Although this case technically involves the construction of a South Dakota statute, it provides an appropriate vehicle for resolution of the FUTA controversy. The South Dakota Supreme Court made clear in its opinion that it interpreted the state statute as being intended to treat parochial schools in the same manner

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[1] The Secretary has administrative proceedings pending against eight other states, in addition to Alabama and Nevada, for failure to conform their unemployment compensation programs to the Secretary's interpretation of the federal statute.

as did FUTA.[2] Thus, the case involves no independent question of state law; rather, as the court below stated, the statutory question here is the "congressional intent with respect to the repeal of Section 3309(b)(3) of FUTA" (Pet. App. A-5). This case, therefore, squarely presents to this Court the question of the proper interpretation of FUTA, the federal statute. See *United Air Lines v. Mahin*, 410 U.S. 623, 630-631 (1973); *State Tax Comm'n v. Van Cott*, 306 U.S. 511, 514-515 (1939).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1980

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[2] This general intent is apparent from provisions of the state statute that tie its coverage to FUTA. See S.D. Codified Laws Ann. §§ 61-1-7, 61-1-18.1 (1978).

B-7103, 2-81